

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

GOOGLE, INC. PLAINTIFF

VS. CIVIL NO. 3:14cv00981HTW-LRA

JIM HOOD, ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI, IN HIS
OFFICIAL CAPACITY DEFENDANT

HEARING ON
MOTION FOR TRO, PRELIMINARY INJUNCTION,
AND THE MOTION TO DISMISS

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE
FEBRUARY 13, 2014
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFF: MR. FRED KRUTZ III
MR. PETER NEIMAN
MR. BLAKE ROBERTS
MR. DANIEL MULHOLLAND

FOR THE DEFENDANT: MR. DOUG MIRACLE
MR. BLAKE BEE
MS. MARY JO WOODS
MS. BRIDGETTE WIGGINS
MR. HAROLD PIZZETTA

REPORTED BY: CHERIE GALLASPY BOND
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1 THE COURT: Good morning. This is *Google, Inc., v.*
2 *Jim Hood, Attorney General, State Of Mississippi, in His*
3 *Official Capacity*, cause number 3:14CV981. The matter before
4 the court is a motion for a temporary restraining order and a
5 motion for preliminary injunction. There's some other motions
6 that are listed, and all of them concerns -- all of them
7 concern motions for leave to file excess pages and to file
8 amicus briefs.

9 Now, let's have the parties identify themselves,
10 starting first with plaintiff.

11 MR. NEIMAN: Good Morning, Your Honor. Peter Neiman
12 from Wilmer Hale for Google. I'm joined at counsel table by
13 Fred Krutz, Blake Roberts and Danny Mulholland.

14 THE COURT: Good morning to all of you. Thank you.
15 Defense.

16 MR. MIRACLE: Good morning, Your Honor. I'm Doug
17 Miracle on behalf of the Attorney General from the Attorney
18 General's office. With me is Bridgette Wiggins, Blake Bee,
19 Mary Joe Woods, and Harold Pizzetta.

20 THE COURT: All right, then. Thank you so much. Now,
21 who will be making the arguments on behalf of the plaintiff?

22 MR. NEIMAN: I will, Your Honor.

23 THE COURT: And on behalf of the defense?

24 MR. MIRACLE: I will, Your Honor.

25 THE COURT: All right.

1 MR. MIRACLE: Your Honor, may I make one comment. I
2 just want to indicate that we do have a motion to dismiss that
3 was also filed on the jurisdictional issue.

4 THE COURT: That's right. I saw that motion too.
5 Now, will any of the parties be presenting evidence by way of
6 testimony?

7 MR. NEIMAN: Not for Google, Your Honor.

8 MR. MIRACLE: No, Your Honor.

9 THE COURT: All right. And with regard to the motions
10 for amicus briefs, do you have a position -- let's start with
11 plaintiff.

12 MR. NEIMAN: We have consented to a number of the
13 motions. That was one motion that we took no position on,
14 which Your Honor has already granted, which was the motion by
15 the DCA. But as to the others, we consent to all of them.

16 THE COURT: To the briefs?

17 MR. NEIMAN: To the filing of the amicus briefs, yes.

18 THE COURT: Okay, thank you.

19 MR. MIRACLE: Your Honor, we have not taken a position
20 nor opposed, and we have consented to those that requested our
21 consent.

22 THE COURT: All right. Then there are several
23 motions. I'll go down the list that I have. You can check
24 your list against mine. First of all -- well, let me talk
25 about the amicus brief first. There's one filed by Jack

1 Conway. The court then allows that.

2 There's one filed by the Center for Democracy and
3 Technology. I'll allow that one. Another one is filed by
4 Computer and Communications Industry, granted.

5 Then this might be a second request, but Center for
6 Democracy and Technology, Electronic Frontier Foundation, Open
7 Technology Institute, Public Knowledge, R Street Institute,
8 granted.

9 And one requested by Internet Commerce Coalition,
10 granted.

11 There's a motion for leave to file excess pages filed
12 by the Attorney General. That motion is now moot, is it not?

13 MR. MIRACLE: There it was no opposition to the
14 motion, and we submitted our papers accordingly.

15 THE COURT: That's why I said it is really moot at
16 this point, isn't it?

17 MR. MIRACLE: I think so, Your Honor.

18 THE COURT: So then we have a motion for TRO,
19 preliminary injunction, and the motion to dismiss. Those are
20 all the motions that I have listed on my motions report. Are
21 there any others?

22 MR. NEIMAN: Not that I'm aware of.

23 MR. MIRACLE: Not that I'm aware of.

24 THE COURT: All right. How much time do you want for
25 your argument?

1 MR. NEIMAN: I'd ask for about 45 minutes, Your Honor.

2 THE COURT: And then for rebuttal?

3 MR. NEIMAN: 20 minutes.

4 THE COURT: Let me hear from the other side. Thank
5 you.

6 MR. MIRACLE: I think similar amounts of time from the
7 state, Your Honor. I would point out that I think our motion
8 to dismiss is going to be wrapped up somewhat in our response
9 to the motion for preliminary injunction, as far as
10 establishing the four factors. I don't know how Your Honor
11 wants to proceed in hearing the jurisdictional motion from the
12 state as opposed to our response to the core of the preliminary
13 injunction. But we'll be arguing both. I can argue those both
14 at the same time, however Your Honor wants to proceed on that.

15 THE COURT: All right.

16 MR. NEIMAN: Just to be clear, that's what I was
17 contemplating in the times that I gave Your Honor to address
18 both sets of issues.

19 THE COURT: All right. Then I will hear both at the
20 same time.

21 MR. MIRACLE: Thank you, Your Honor.

22 THE COURT: All right. Now, are you prepared to go?

23 MR. NEIMAN: I'm prepared to proceed, yes.

24 THE COURT: Do you have exhibits?

25 MR. NEIMAN: We have a couple that we're going to put

1 on the screen. I can also give you hard copies, if you'd like.

2 THE COURT: No, those on the screen will be
3 sufficient. And for the record, we'll take the hard copies,
4 though.

5 MR. NEIMAN: We can bring it up at the end if you
6 like.

7 THE COURT: Okay. Now, have those been shown to
8 opposing counsel?

9 MR. NEIMAN: They are simply excerpts of documents
10 that are already in the record, and I've explained that to
11 Mr. Miracle.

12 MR. MIRACLE: Same for us, Your Honor. Everything
13 that we'll be using and as Mr. Neiman has been said, there have
14 been exhibits to the papers that have been filed in our court.

15 THE COURT: All right. Then you may begin.

16 MR. NEIMAN: Thank you, Your Honor. And good morning.
17 Your Honor, I thought before I got into kind of the details of
18 the arguments, both for Google's motion for preliminary relief
19 and for the Attorney General's motion to dismiss, I'd like to
20 step back first for a minute and just talk about why Google
21 filed this case. That was not a step that Google took lightly.
22 I understand that outside the world of patents and some
23 collection matters, this is the only lawsuit Google has filed
24 in several years. Google responds to subpoenas and cooperates
25 with investigations all the time.

1 This inquiry was different. Mississippi's Attorney
2 General was trying to establish indirectly through threat of
3 prosecution and a very burdensome 79-page subpoena state
4 regulation over the content that Google makes available to the
5 Internet, content created by third parties. State regulation
6 of that is contrary to core First Amendment principles, and it
7 is contrary to the judgment that Congress reached when it
8 passed the Communications Decency Act in which it granted broad
9 immunity to Internet service providers for their display of
10 third-party content, and it did so with the express goal of
11 promoting the growth of the Internet unfettered by state
12 regulation.

13 Now, over the last 18 months, the Attorney General has
14 repeatedly demanded that Google remove certain content that
15 shows up in search results, remove certain videos that show up
16 on YouTube. He has threatened to prosecute Google under the
17 Mississippi Consumer Protection Act if it doesn't do what he
18 wants, and he issued a 79-page subpoena when Google refused to
19 do everything that he demanded.

20 He did all of that despite having acknowledged in
21 writing in a letter to Congress that he lacked the authority to
22 bring the very case that he was threatening. And he did all
23 this following, you know, a covert lobbying campaign from the
24 Motion Picture Association.

25 So with that conduct, those threats and demands, they

1 left Google with a really stark choice. They could comply with
2 the demands, alter their editorial judgments, stop providing
3 all the information that they provide to users, on the one
4 hand, or they could risk felony prosecution that the Attorney
5 General was threatening quite explicitly as recently as
6 December 18th, the day before Google filed this lawsuit.

7 Now, it's our position that federal law precludes the
8 Attorney General from forcing Google to pick between giving up
9 its federally protected rights or risking state prosecution.
10 Indeed, I think that's precisely the function of federal court
11 to step in when state officials are demanding that people do
12 things in violation of state -- of federal law and they
13 threaten prosecution if there's no compliance with those
14 unlawful demands.

15 And the reason for that, you know, is the federal law
16 recognizes that these kind of threats have real consequences.
17 This is not abstract. These threats coerce people into giving
18 up their rights. I mean, it's just -- it's much easier to just
19 go along and say, okay, we'll do some of what you want than it
20 is to stand up for your rights. In fact, you know, it's not --
21 it wasn't easy for Google here. The record reflects and this
22 is in the affidavits of Mr. Thomas and Ms. Woo that were
23 submitted in our response papers that there are real concrete
24 things that Google did to change its constitutionally protected
25 and statutorily protected editorial judgments to try and

1 mollify the Attorney General to try to make the choice of well,
2 maybe, we'll give him a little bit of our rights rather than
3 risking a threatened prosecution.

4 Just to give you one example of that, this is laid out
5 in our papers, the Attorney General complained that there were
6 videos on YouTube that other people were putting up, not that
7 Google was putting up, that were, he says, promoting buying
8 pharmaceuticals over the Internet. And he was very upset that
9 ads were running against those videos. That's all perfectly
10 protected conduct under the Communications Decency Act, but he
11 was complaining about it quite strongly.

12 And Google had to make a choice. Do we stand on our
13 rights or do we try to do something to mollify him. And what
14 Google did was kind of only the practical way to address the
15 problem that he was identifying was it had to come up with a
16 really overbroad solution because, you know, there are 300
17 hours of new video added to YouTube every minute. There's no
18 way that anybody can review all of them. You would have to
19 double the size of the company, have people 24 hours a day
20 doing nothing about that.

21 And so what Google does is they have all kinds of
22 systems that he can analyze videos and come to kind of a
23 general sense of what topic the video is on and can classify
24 videos. Okay. This is in the classification of health and
25 pharmaceuticals. That can include the kind of video that the

1 Attorney General complained about, but it could also include,
2 you know, a video promoting Vick's VapoRub, which is, in fact,
3 one of the videos that was up on YouTube that ads were running
4 against.

5 And the only way to make sure that no ads were running
6 against the videos that the Attorney General complained about,
7 the only practical way to do that was to block videos from --
8 ads from running next to any video that was identified as being
9 in this kind of health and pharmaceuticals class. It was like
10 their very overbroad step was the only practical way to get at
11 the issue that the Attorney General was raising and that was an
12 infringement on Google's editorial judgment and meant there was
13 much less incentive for people to post videos that fit into
14 that category because they couldn't get compensated through ads
15 in doing so. So it in a very real way chilled both Google's
16 and the public's access to perfectly legitimate information.

17 So that's why we're here. Those are serious matters.
18 And, you know, Google took all kind of steps to avoid having to
19 come to court. We voluntarily answered dozens of written
20 questions before the subpoena was ever filed. You can see
21 those answers in the record. We produced something like
22 100,000 pages of documents to the Attorney General. We met
23 with them over and over again. We provided them evidence
24 before we brought this case that every piece of content that he
25 had objected to was created by third parties, not by Google,

1 which means that it's protected by -- that Google's conduct is
2 protected by the Communications Decency Act. None of that had
3 any impact. The threats and demands continued. And, if
4 anything, they escalated.

5 So that's why we're here. We're asking the court to
6 issue an injunction that will do two things: One, preclude the
7 Attorney General from bringing the very prosecution that he's
8 threatened repeatedly; and, second, that would enjoin him from
9 enforcing this 79-page subpoena.

10 Now, what does the Attorney General have to say about
11 all of this? First, I think importantly there isn't really a
12 fight on the facts here. We have submitted seven declarations
13 and 74 exhibits that detail all of the threats and demands that
14 the Attorney General has made, all of the ways this has
15 impacted Google, talk about all the things Google does
16 voluntarily to try and limit objectionable content that can be
17 obtained by its services, and the Attorney General doesn't
18 challenge any of that. And so that means that as you consider
19 motions here, you can accept as true all the facts that are set
20 forth in our affidavits and the exhibits and all the
21 allegations of our complaint because they are not disputed.

22 Mostly what the Attorney General does is raise
23 procedural objections. He claims this is just not the kind of
24 dispute that's appropriate for a federal court to decide. And
25 he suggests, you know, maybe we came to court too soon or maybe

1 we're too late. I think half of his procedural arguments say,
2 oh, you know, this isn't enough of a dispute yet. You're here
3 too early. And the rest of his procedural arguments are, well,
4 the court should abstain because we have already issued a
5 subpoena. You have come to court too late. We don't think it
6 is either of those things. We don't think we're too early or
7 too late. We think we're here at the right time.

8 Let me spend a few minutes telling you why I think
9 that. Let's start first with this suggestion that we're here
10 too early, that there isn't really a real concrete dispute here
11 or real threat of prosecution that needs to be addressed. I
12 think that just does not fit the undisputed facts in the
13 record.

14 Let me just walk you through for a couple of minutes
15 and what the Attorney General has actually said, his own words
16 about what he's threatening, what he's demanding, why he issued
17 the subpoena and what's going to happen to Google if it doesn't
18 do what he demands.

19 Let me just walk through that. And here is where I
20 have some stuff that I'm going to put up on the screen for you,
21 Your Honor. So let's talk about what the Attorney General is
22 complaining about it. What is it that he doesn't like? Here's
23 the first one. When Google promotes through its search results
24 websites obviously selling unlawful drugs or streaming pirated
25 videos, Google cannot escape liability. This is from a letter

1 that the Attorney General sent to Kent Walker. Mr. Walker is
2 the general counsel of Google. He's here today over here.
3 This is one of the things the Attorney General doesn't like.
4 He doesn't like search results that goes to content he doesn't
5 like.

6 Let's look at the next thing that he's identified. On
7 YouTube, Google enters into contracts with the producers of
8 YouTube videos to monetize illegal content and fund criminal
9 activity. Such aiding and abetting of criminal activity falls
10 outside the immunities of Section 230 of the CDA. That's the
11 second thing he has identified, videos that he doesn't like on
12 YouTube and ads running against those videos that he doesn't
13 like. All of that is protected by the Communications Decency
14 Act. That's the second thing he's focused on.

15 Let's look at the next thing. He says we're aiding
16 and abetting by allowing autocomplete to lead and even
17 encourage users to illegal activity. Just a reminder of what
18 autocomplete is. That's when you're typing in your search and
19 Google has an algorithm to predict what I think you're likely
20 typing, based mostly on what other people have been typing when
21 they -- what other people have finished typing when they
22 started typing the same thing you're typing, almost like a
23 spellchecker, but it gives you some suggestions. You don't
24 have to take them, but they are suggestions. And they are just
25 an algorithmic prediction based on searches that other people

1 have entered. That's the primary criteria for generating those
2 predictions, and we said it in our briefs and multiple courts
3 have said that that kind of neutral tool that is making
4 algorithmic predictions based on searches that people have
5 perviously entered in large part and that that's protected
6 under the CDA. Also we have cited those in our papers. So
7 those are his complaints. That's what he doesn't like.

8 Let's look now at what he's demanded that we do. So
9 here, this is the Attorney General says Google should not index
10 cites substantially dedicated to intellectual property
11 infringement. He wants to index -- that's the thing that
12 Google's search operates on. So the way it works is Google
13 kind of sends these robots of sites around the internet and
14 gathers up all this information because it visits 20 million
15 websites a day, I think it is. All of that goes into this
16 index and then the search runs against that index.

17 What the Attorney General is saying is that, hey, take
18 these websites out of the index so they will never show up in
19 search results. And it's not sites that have nothing
20 legitimate on them but sites substantially dedicated to
21 intellectual property infringement. So who knows what that
22 means, but he's saying, *Don't even let people find these*
23 *things. They have to take them out of your search.*

24 By the way, that is the kind of overbroad remedy that
25 Congress expressly rejected two or three years ago after there

1 was as huge outcry from the public about the notion of that
2 kind of overbroad removal from the Internet of sites simply
3 because they had some infringing content. Google takes out of
4 search results anything that a copyright holder identifies
5 specifically as infringing on these 200 million web pages a
6 year. But that's not what the Attorney General is asking for.
7 He's saying take down the whole site, everything on it,
8 infringing or not.

9 What is his next demand? Announce a 24-hour link
10 through which the Attorney General's deindexing requests are
11 granted or addressed within hours. This is a pretty
12 extraordinary one. He is saying, *Give me, the Attorney General*
13 *of Mississippi, the right to just tell you, Take out this, take*
14 *out that, anything I want.* No judicial review, no neutral and
15 detached magistrate making this decision, just the Attorney
16 General saying to Google, *Take that out.* Unprecedented
17 request.

18 So the next one. Remove popular copyrighted content
19 from YouTube videos and/or deprioritized videos that contain
20 links to known rogue sites for copyright content. Again, I
21 don't like the content of some videos on YouTube that third
22 parties are posting, take it down. It is interesting here.
23 I'll pause on this for a moment. With regard to YouTube,
24 Google has a system to take complaints, and they have rules
25 with regard to YouTube for community standards, and if people

1 complain about something and it violates the community
2 standards, YouTube takes it down all the time. We decided to
3 give the Attorney General a tool to tell us after complaints
4 like this specifically what did he want to come down. And, you
5 know, he identified -- he's had that tool for more than a year.

6 He identified seven videos, one of which was perfectly
7 fine and six of which were taken down. It is kind of
8 interesting that of the six that were taken down, we didn't get
9 a single request from the Attorney General, *Hey, tell us who*
10 *put that content up. We'd like to stop the people who are*
11 *doing this bad stuff.* They never asked. They are trying to
12 cloak themselves in, *Let's make the Internet safer*, and here we
13 are, they have identified some video that has content that they
14 think is improper.

15 We have taken them down. We have all kinds of
16 information. They never asked us. Google four times a year
17 provides information to the FDA about websites that are showing
18 up and services that seem to be involved in selling
19 prescription drugs improperly. We're happy to help law
20 enforcement go after the bad guys. We never get any kind of
21 request like that from the Attorney General.

22 Let's look at the next thing. He says eliminate
23 autocomplete terms such as, "buy oxycodone online without a
24 prescription." That was in a letter to Kent Walker back in
25 April of 2013. Google has done that. If you type in "buy

1 oxycodone online," you don't see the auto complete prediction
2 that you might be typing in. "Without a prescription" doesn't
3 show anymore. We have filtered the autocomplete system so that
4 it doesn't slow up.

5 But again these are complicated big systems, and you
6 can't just take out "oxycodone without a prescription" because
7 if that's all do you, then "Vicodin without a prescription" is
8 going to show up and then "Viagra without a prescription" is
9 going to show up. And there's so many different ways to
10 describe all these products that there's no way to just focus
11 on stuff that will be problematic. Instead you have to do the
12 overbroad solution, which is to take out "without of
13 prescription" to filter that so it doesn't appear as an
14 autocomplete prediction for any search inquiry.

15 So what that means is if you type in "buy Claritin
16 without a prescription," Claritin is an allergy medicine that
17 used to be a prescription drug and is not anymore. If you
18 aren't sure and you want to find out from Google, hey, can I
19 buy Claritin without a prescription, autocomplete no longer
20 helps you finish that because Google, trying to mollify the
21 Attorney General, who is making these demands through things
22 you are perfectly lawful to stop but it is easier to give up a
23 little bit of your rights than to risk prosecution. Google
24 takes that stuff out, and now its services aren't quite as
25 useful as it used to be. So those are what the Attorney

1 General demanded.

2 Let's talk about the subpoena a little bit. So we are
3 going along, and we are giving them documents and talking to
4 them and answering questions, but we're not agreeing to just
5 take stuff out of search results like they want. And the
6 Attorney General is not pleased with that, and he says -- and
7 this is in a public speech he made at the National Association
8 of Attorney Generals. "I told Google if you don't work with us
9 to make some of these changes, things I just showed you that we
10 have been suggesting since November, I'm going call my
11 colleagues to issue civil investigative demands or subpoenas."
12 It's clear in his own words he's saying, *If you don't do what I*
13 *want, I've got all of that law stuff about what you have to do.*
14 *If you don't do what I want, I'm going to issue you a subpoena.*

15 Where did that subpoena come from? Well, in is an
16 interesting note, this is revealed in press accounts emailed
17 from the outside counsel from the MPAA, a man named Tom
18 Perrelli, who is outside counsel for the Motion Picture
19 Association. He is a partner in a firm called Jenner & Block.
20 That's the firm that we have shown in our papers actually wrote
21 word for word one of the letters that the Attorney General sent
22 to Google.

23 Here's what he's saying a few months after that letter
24 that he wrote -- his firm wrote, I should say, "The time for
25 letter writing is over. It is time to move to actually form an

1 investigation. I think we should shore up Hood and try to get
2 a small group focused on a clear timetable for CIDs." He's
3 pushing for a subpoena to be issued for Google. What does he
4 offer to do? Draft the CID. What do we end up getting? A
5 79-page subpoena. He didn't do what he wanted.

6 Let's go now to his threats. So this is what the
7 Attorney General said when he spoke about this case at the
8 Neshoba County Fair back in 2013. "Google's revenue were
9 42 billion last year. And these companies don't move until
10 they see fire and gun smoke. A lawyer with a badge is not
11 enough to push them a lot of time. Some of them, some of the
12 time, you had to put somebody in jail." Jail, for search
13 results.

14 Let's go to a little more recent. This is the day
15 before we filed this lawsuit. "The company, you know, is
16 clearly one that should be convicted of a felony." That's what
17 he said the day before we brought this case. We're not here
18 too soon. There is a very concrete threat of prosecution here.
19 We know what it is he doesn't like. He's made it perfectly
20 clear what he wants, what he's demanding and how he's going to
21 try and coerce us into doing that, and he's threatening jail
22 and felony prosecutions.

23 That's something a federal court can hear?
24 Absolutely. You know, going back all the way to *Ex Parte*
25 *Young*, it's been clear that when state officials are

1 threatening to bring a case that would be violative of federal
2 law, as this one would be under both the First Amendment and
3 the Communications Decency Act, federal courts absolutely have
4 jurisdiction to step in and say, no, you can't do that.

5 Just to give you two cases that we have cited in our
6 brief that I think are particularly analogous to our situation
7 here, the first case is the *TWA v. Morales* case. And that's a
8 case in which state Attorney Generals were threatening to bring
9 a lawsuit under their consumer protection laws, the same laws
10 that the Attorney General has invoked if the airlines wouldn't
11 change some of their pricing practices. The problem was that
12 federal law had deregulated the airlines and had preempted any
13 state effort to regulate how the airlines went about these
14 practices. And a federal district judge looked at those facts
15 and issued an injunction precluding the state from bringing the
16 cases that they were threatening. That went all the way up to
17 the Supreme Court, and the Supreme Court affirmed.

18 We have exactly the same thing here. We have the
19 Attorney General threatening to bring a case. We have federal
20 law from the CDA that preempts state prosecution and state laws
21 that would punish Google for displaying third-party content,
22 exactly what he's complaining about. We have even more here
23 because *Morales* was just a statutory case. Here we have
24 constitution issues because we have got First Amendment Rights
25 here, rights to make our own editorial judgments without the

1 government telling us what we can do and not do. So this case
2 is just on all fours, and there's clear jurisdiction.

3 As to the subpoena and the court's jurisdiction to
4 address that, we can look at a case like *Cuomo v. Clearing*
5 *House*. That's a case in which the Attorney General of New York
6 was demanding that some national banks provide him some
7 information, threatening to subpoena them if they didn't do it
8 voluntarily. And there was a federal law that said that states
9 don't have certain authority over national banks.

10 The banks went to court. They got an injunction
11 against the demand for information. It went up to the Supreme
12 Court, and the Supreme Court affirmed the injunction. Again,
13 it's perfectly clear that when a federal law bars an Attorney
14 General from demanding certain information from certain people
15 in certain contexts, that's enforceable in federal court, and
16 the court has jurisdiction to do it and the Supreme Court has
17 held that. So we're not here too soon, and this is exactly the
18 kind of case that a federal court has jurisdiction to hear.

19 Let me talk for a minute about the suggestion that
20 maybe if we're not here too soon, it is that we're here too
21 late because they have already issued a subpoena. And I think
22 they suggest that you ought to abstain. And I don't think
23 that's right, and let me try and explain why. So I think cases
24 like -- that we have cited in our briefs like *Sprint* and *NOPSI*
25 make very clear that once the federal court's jurisdiction is

1 properly invoked, as it has been here, the court has what they
2 call an unflagging obligation to hear the case. There are some
3 exceptional circumstances narrowly defined where the court
4 instead of doing that can abstain, but there are only three
5 circumstances, and none of them apply here.

6 What those circumstances have in common is they all
7 involve situations that -- certainly the first two and the
8 third -- which is the certain kind of special court orders like
9 how much you have to post bond pending appeal are sort of not
10 relevant here, and I don't think anybody has suggested that
11 they are. But the other two are for a pending criminal case
12 and a pending civil enforcement proceeding.

13 Even if you have those things, there's still lots of
14 reasons why you would not be required to abstain here. But we
15 don't have either of those things. Google has not been charged
16 criminally. There's a threat, but that's it. Nor has the
17 Attorney General brought a civil enforcement proceeding. I
18 mean, that is something where the state has made kind of a
19 formal judgment on bringing a case against you, and they charge
20 you either criminally by way of indictment or civilly by filing
21 a complaint somewhere either in court or in an administrative
22 proceeding.

23 The supreme Court has never found that abstention is
24 appropriate just because a civil enforcement proceeding has
25 been threatened or because one subpoena has been issued. And

1 that subpoena, just to talk about what the Attorney General's
2 own words are, what he says about his subpoena is that it's
3 a -- I want to get the quote right so let's just pause a second
4 and look at my notes. He says that it is a
5 "nonsell-executing," a quote, and a "prelitigation
6 investigative tool." And that's also a quote. He maintains
7 successfully in the *Gulf Coast Claims* case that we cited in our
8 brief that it was not even a civil action at all and there had
9 been a subpoena issued and a motion to compel filed in state
10 court to enforce that subpoena. The subpoena itself, which is
11 all that we have here is just not a civil enforcement
12 proceeding. It is what the Attorney General said it was, a
13 prelitigation tool to gather evidence. And so under the
14 Supreme Court's clear command in cases like *Sprint* and *NOPSI*,
15 there's just no basis. We haven't come to court too late.

16 So that's, you know, what I'd like to say about the
17 procedural arguments that the Attorney General has made. I'd
18 like to move now to a discussion of the merits. I'm going to
19 talk first about why Google is likely to succeed on the merits
20 here, and then I'll talk about the balancing of the equities,
21 irreparable harm, whether there is any harm to the Attorney
22 General for maintaining the status quo or where the public
23 interest lies.

24 At the start, I want to say all the court has to
25 decide today is whether to preserve this status quo. That is

1 to say, whether to continue the situation that we're in now,
2 which is that the Attorney General has agreed not to bring a
3 case and has agreed not to enforce the subpoena for now. And
4 so all the court has to decide today is whether to continue
5 that.

6 On the likelihood of success on the merits, let me
7 start on the merits of our claim that the threatened
8 prosecution is unconstitutional and in violation of the
9 Communications Decency Act. I won't take you back through the
10 slides that we looked at, but I think it just couldn't be
11 clearer from those slides that what the prosecution has
12 threatened is one that relates to the display of third-party
13 content, and that's exactly what the Communications Decency Act
14 says "hands off." The state hasn't any regulatory authority.
15 We want that to be unfettered. And that's exactly what the
16 First Amendment says too, that before you make editorial
17 judgments, what information do you provide.

18 You know, I think there's some suggestion in the
19 Attorney General's brief that this is really about some other
20 thing, maybe this is about like pre 1972 sound recordings or
21 maybe he could somehow bring a case about whether Google's
22 public statements match precisely what its practice is although
23 he hasn't really identified any disconnect. But those are just
24 hypotheticals. They are coming from nowhere but his briefs.

25 The evidence in this case, the affidavits, the

1 undisputed evidence of what the Attorney General has actually
2 said make perfectly clear what he's threatening and what we're
3 trying to get enjoined, and that's a prosecution for displaying
4 third-party content through search results, through YouTube and
5 through autocomplete suggestions. And that's just exactly what
6 the Communications Decency Act and the First Amendment forbid a
7 state from doing, from getting in the business of deciding what
8 third-party information and Internet service provider can make
9 available.

10 So I think there is ample basis to find that we're
11 likely to succeed on the merits with regard to our challenge to
12 the prosecution that he's threatening and a request for an
13 injunction against him.

14 I think Google's likely to succeed on the subpoena
15 also, and there are multiple independent grounds on which the
16 court could find that we're likely to succeed with regard to
17 the subpoena, and perhaps the simplest one is that the Attorney
18 General's own words show that this subpoena was issued to
19 coerce us to give up our First Amendment rights in retaliation
20 for our refusal to do so.

21 And there's kind of a simple three-part test that the
22 Fifth Circuit lays out in *Wilson* for what to do when you have
23 government action that's alleged to be no retaliation for
24 exercise of protected rights. And, you know, that requires us
25 to show that we are engaged in protected activity. I don't

1 think that's really disputed. Then we have to show that there
2 was a retaliatory purpose, and I think the Attorney General's
3 own words are the only evidence on the purpose of that subpoena
4 and the words are perfectly clear.

5 And then that shifts the burden to the state to
6 present evidence that they would have issued the subpoena
7 anyway, even without that retaliatory purpose, and there's no
8 evidence of that in this record. The silence on that topic
9 from the government is deafening.

10 Talking about evidence, they say in their brief, of
11 course we would have done it anyway, but there's no affidavit
12 from anybody saying that. So what you have on one side of the
13 scale is our undisputed evidence that we think creates a more
14 than fair inference of retaliatory purpose to deter us from our
15 protected conduct.

16 And on the other side of the balance you have nothing.
17 And at the stage of evaluating likelihood of success on the
18 merits, that's just not a close question. For that reason
19 alone, we're likely to succeed. But we're also likely to
20 succeed, I think, on our argument that the Communications
21 Decency Act bars this subpoena because, as the cases we've
22 cited in our brief show, the Communications Decency Act is not
23 just a defense, not just a bar on liability. It is also a
24 defense that is being brought and all that that entails -- and
25 there are many cases that say this -- that it's a protection

1 against the burdens of defending against the claims that never
2 should have been brought in the first place. So I think that
3 extends to the subpoena here as well.

4 If you had any doubt whether this subpoena was really
5 investigating conduct that's protected by the Communications
6 Decency Act instead of investigating the kind of things that
7 the Attorney General identifies in his brief, I don't think you
8 have to look any further than the first definition, and I'll
9 put that up on the screen.

10 This is definition number 1. And it says right in it,
11 you know, four lines down that aiding and abetting,
12 facilitating, encouraging include any actions whether or not
13 the acts would be protected or immunized under the
14 Communications Decency Act. It is just right there in black
15 and white. That definition then gets incorporated into the
16 next two definitions which are about, you know, dangerous
17 conduct and unlawful conduct, which if you read the definitions
18 turns out to mean everything because I think -- and I'll
19 butcher this. I'll give more tangentials than might really be
20 in there. But it's like more -- the word "tangential" more
21 times than may be in there, but it's like any action that could
22 be tangentially related to anything that might tangentially
23 influence anybody to do anything that might be dangerous or
24 unlawful.

25 It is incredibly broad and incorporates this aiding

1 and abetting language as well, and that gets carried forth
2 through the whole subpoena so it's intertwined throughout that
3 this is all about immunized conduct.

4 And, you know, it's not like we just left it there and
5 didn't try and work this out. We had conversations with the
6 Attorney General's office several times, and these are
7 reflected in my affidavit and they are not disputed in this
8 record. And as we said, hey, we think you're going further
9 than you're allowed. There has to be some recognition here of
10 the immunity provided by the Communications Decency Act. There
11 has to be some recognition of the fact that the copyright,
12 which the subpoena focuses on substantially like that is
13 preempted by federal law. The state doesn't have authority
14 over copyright, and there has to be some recognition in here
15 that had, you know, the portions of the subpoena that focus on
16 importation of pharmaceuticals. Again that's a topic that's
17 regulated by federal law exclusively.

18 So we said to them, you know, that has to be
19 recognized in here somehow. You can't just ask for all of this
20 stuff. And the answer that we got back was, no, the federal
21 law has no impact on what we can ask for. That's what they
22 said, and that's just wrong. We have cited multiple cases that
23 made clear that federal law does limit what Attorney Generals
24 can demand: In *Major League Baseball v. Crist* that we cited,
25 where a state Attorney General was demanding information

1 relevant to an antitrust investigation that was preempted by
2 federal law, and the court said, no, you can't do that. *Coumo*
3 *v. Clearing House* I mentioned before, where the state Attorney
4 General was demanding certain information from national banks
5 and the Supreme Court said, no, you can't do that. Federal law
6 precludes that. In the CDA context itself, in a case like
7 *VoiceNet*, which is cited in our papers, you know, courts have
8 recognized that the CDA can limit demands for information. But
9 their answer was no, no impact. I think from that kind of
10 fact, that kind of evidence undisputed in this record, you did
11 quite fairly infer what was going on here. This was focused
12 precisely on our immunized conduct with intent to deter us from
13 continuing to engage in it so we're likely to succeed on the
14 merits here.

15 Let's me turn to the balance of the equities. I think
16 Google faces immediate irreparable harm if no injunction is
17 issued here. If that happens, it will be right back in the
18 position that it was in before it brought this case under
19 threat from the Attorney General doing things that were
20 limiting. Information was provided in order to try to put them
21 off, calm them down. We would be right back under the very
22 coercion that the First Amendment precludes, that the
23 Communication Decency act precludes.

24 Once again, I have to make that choice. Do I limit my
25 constitutional protected and statutorily protected behavior or

1 do I risk that he brings this case? And that would claim to
2 chill Google's speech rights by itself. That's not enough to
3 establish irreparable harm and would also deny Google its
4 immunity under -- at least the benefit of the immunity provided
5 by federal law. And *Elrod v. Burns* says if you are losing
6 constitutional rights, even for a little while, that's
7 irreparable harm and you know we have a documented concrete
8 record of the chilling effect these threats have and will
9 continue to have if no preliminary relief is granted.

10 The same is true, I think, as to the subpoena. The
11 subpoena, after all, is one of the tools that the Attorney
12 General is using to coerce us to give up our federally
13 protected rights. Leaving that subpoena in place will subject
14 us to the very coercion that we're trying to avoid by bringing
15 this case. And leaving that subpoena in place would deny
16 Google the protection of the Communications Decency Act against
17 the burdens of defending against claims that should never have
18 been brought in the first place, the burdens of discovery that
19 many courts have recognized that the CDA protected.

20 So that's what we have on the irreparable harm side of
21 the equation from Google. Again we have the Attorney General,
22 what's his harm if the court grants preliminary relief. And
23 the answer is essentially none. Preliminary relief would
24 simply continue the status quo, and the preliminary injunction
25 we're seeking is no different from the consent order that's

1 already been in place for months. It would preclude him from
2 bringing a case that's he's threatened based on our display of
3 third-party content on search and YouTube and the like, and it
4 would enjoin him from enforcing his subpoena. But that's it.
5 He remains free to conduct any investigation he wants that is
6 properly within his jurisdiction. If he could bring a case,
7 bring it, but all the injunction does is put on hold to bring
8 the case that he's threatened until the court can reach a final
9 judgment as to whether that threatened case is unlawful and is
10 prejudiced at all.

11 We need to talk about the public interest here too.
12 The public has a very strong interest in free access to
13 information on the Internet. Congress has declared that to be
14 national policy, that he entered -- that Congress has declared
15 a national policy that the Internet be unfettered by state
16 regulation, and there are plenty of cases, and we have cited
17 them, that protection of constitutional interest is always in
18 the public interest.

19 Now, I expect to make here when the Attorney General
20 stands up that, well, you have gotten this amicus brief from
21 the some other Attorneys General who are suggesting there's
22 some more broad threat to the power of Attorneys General to do
23 their jobs. I don't think that's right here. You know, first
24 of all, I would note that I think there may be 11 or 12
25 Attorney Generals who signed that brief. That means that three

1 quarters of the Attorney Generals didn't. And I think there
2 could be -- if there was a serious threat, the ability of the
3 Attorney General to do their jobs wouldn't have three quarters
4 completely sitting on the sidelines.

5 In that brief -- if what we were asking for was
6 complete immunity from all scrutiny, then that brief would make
7 some sense. But that's not what we're asking for. We're
8 objecting to this subpoena and this threatened prosecution. On
9 this subpoena, the Attorney General stands completely alone.
10 There's nobody else. We saw in some of those bullets that I
11 put up before that there was an effort to get other people to
12 join in this subpoena. But he stands alone.

13 I think if you consider that, consider whether the
14 injunction we seek would really impair the ability of attorneys
15 to do their job, is it going to impair the ability of Attorney
16 Generals to do their job to enjoin a subpoena entirely -- that
17 is so heavily focused on immunized conduct? I think a 79-page
18 subpoena apparently drafted by the Motion Picture Association
19 that's trying to build an investigation into conduct that's
20 immunized, really enjoining an act is going to stop attorneys
21 general from doing their job from all areas when they do it
22 perfectly lawful within their jurisdiction, I just don't think
23 that's credible.

24 I just want to wrap up my remarks by talking about
25 what I think that is at stake here. The power of Attorneys

1 General is not at stake at all. That will continue. But there
2 are serious things at stake here. The Internet is an amazing
3 thing. It has put at our fingertips an unbelievable amount of
4 information.

5 When I started as a federal prosecutor in 1996, the
6 notion that you could sit down at your desk and just by typing
7 in a few words get access to, you know, all of the world's
8 information essentially in an eighth of a second for free would
9 have been unimaginable. But, you know, the Internet revolution
10 has brought that to us. And, you know, if Internet service
11 providers that have search engines can go to jail, as the
12 Attorney General has threatened, for making third-party content
13 available, that world is going to change because if search
14 engines risk felony convictions for making third-party
15 information available, they have no choice but to screen
16 information before they make it available.

17 And, you know, as I mentioned before, we are talking
18 about 20 billion websites reviewed every day. There aren't
19 enough people in the world to prescreen that. So it is
20 inevitable that people go to jail for making third-party
21 content available on the Internet, that search engines are
22 going to have to dramatically reduce the amount of information
23 that they provide because they just can't prescreen everything.
24 So the inevitable result of this would be a dramatic reduction
25 in the amount of information available.

1 I'm not disputing for a second that some of the
2 information that can be found on Google is unpleasant and it is
3 objectionable. There's no question about that. But the
4 Supreme Court held in *IMS v. Sorrell* -- and I'm going to give a
5 quote, Judge, "The choice between the dangers of suppressing
6 information and the dangers of its misuse if it is freely
7 available is one that the First Amendment makes for us." It
8 is what Congress also made for us when it passed the
9 Communications Decency Act so as to make the Internet
10 unfettered from state regulation. So I think that's what's at
11 stake here.

12 These are serious and important issues, and we
13 respectfully ask that the court deny the Attorney General's
14 motion to dismiss and that the court grant our request of a
15 preliminary injunction to preserve the status quo so the court
16 can decide these very substantial issues.

17 THE COURT: Thank you. We'll take a 15-minute recess.

18 (Recess)

19 THE COURT: During the recess, the IT technician came
20 up and checked the microphone and he discovered that the
21 microphone was really not on. So you did not transgress. It
22 was an electronic matter.

23 MR. NEIMAN: If there's anything I need say again --

24 THE COURT: I heard you on everything, but she has to
25 hear it through her devices here, and she was having some

1 problems picking it up because she has her headphones on and it
2 comes directly through the microphone. And so it was not
3 coming through always clearly. I heard everything you said. I
4 didn't have any problems whatsoever, but because she has these
5 headphones on then, she is dependent on the faithful operations
6 of the sound system and it was not on.

7 And so our tech came up during the break and just
8 checked it and just finished giving me a report on the sound
9 system so that we'll be sure that we wouldn't have the
10 difficulty again. But, again, I heard everything that you had
11 to say.

12 MR. KRUTZ: Your Honor, we don't mind calling it a
13 dress rehearsal, and we can do it again.

14 THE COURT: Thank you so much. All right.

15 MR. MIRACLE: Thank you, Your Honor. I trust you can
16 hear me now.

17 THE COURT: Absolutely.

18 MR. MIRACLE: Your Honor, thank you. Just as
19 Mr. Nieman started his presentation by saying he wanted to take
20 a step back and talk about some things, I too want to take a
21 step back. Because while he touched on the jurisdiction of
22 this court and seemed to indicate that it was *fait accompli*
23 that the court has such jurisdiction, I do want to spend a
24 little bit of time because I think if you unpack the theories
25 under which they have come to the federal court, I think it

1 will be clear that there is no federal subject matter
2 jurisdiction here.

3 And so it against that backdrop I want to say that I
4 think what you heard this morning was what we're dealing with
5 here is an ongoing state law investigation by the Attorney
6 General, and the record in the papers lays out that history of
7 when that -- when this really started in earnest some time in
8 2012.

9 But that's what we're dealing with here. We're
10 dealing with an investigation, an investigation that has not
11 been completed. And we know it's not been completed because
12 Google has not responded to the subpoena. And one thing that
13 was suggested this morning was that Google had to chose between
14 one or two paths, either risk being sued or he spent most of
15 his time talking about federal -- about prosecution. But, you
16 know, there's an entirely different component to this as well
17 and that's a civil action that was not touched upon, which is
18 certainly something that's available under the Mississippi
19 Consumer Protection Act.

20 So I don't -- I think the fact that a lot of what you
21 heard this morning was talking about alleged threats of
22 prosecution. I think we need to keep in mind that under the
23 Act, civil liability is certainly one of the paramount things
24 that the Attorney General is charged with enforcing the
25 consumer protection laws of this state.

1 And I'll touch on this a little bit more when I talk
2 about the merits and the public interest; but, you know, I'd
3 like to frame this at the outset that while it was suggested
4 that there's no harm to the Attorney General, his duty is to
5 protect the consumers of the state of Mississippi, and that's
6 what he's been doing. And so I think it's really important
7 that we remember it's the average consumer that the Consumer
8 Protection Act of the state of Mississippi is designed to
9 protect. So that interest is paramount because that's what
10 started this investigation.

11 So we have an investigation that's not completed. We
12 have a subpoena that's not been responded to. And while it was
13 suggested that they had to choose between one of two paths,
14 come to federal court or risk litigation, they left out the
15 obvious one, and that was they could have moved to quash this
16 subpoena in state court. And the way this statutory mechanism
17 is set up, these civil investigative demands or as the subpoena
18 itself is an administrative subpoena and subpoena duces tecum,
19 that statutory provision requires the Attorney General, if a
20 party -- in this case Google -- doesn't comply with the
21 subpoena, that he has to go enforce that in state court.

22 That means this subpoena is enforceable only in state
23 court. It was issued pursuant to state law, and it's
24 enforceable only under state law. They didn't do that.
25 They've said we only -- we had one of two choices, either risk

1 litigation or we've got to come to federal court. That wasn't
2 their only choice.

3 And the Attorney General worked with them after the
4 subpoena was issued. We know that the Attorney General
5 voluntarily agreed to extend the subpoena deadline from
6 November 21st to January 5th in an effort to continue to
7 resolve this state matter. What did Google do? In the
8 interim, on December 19th, several weeks before the subpoena
9 was even due, they filed this lawsuit. So I don't think it's
10 accurate to say their only two chooses were to risk litigation
11 or come to federal court. They had another option. The option
12 that was most logical for a state court to interpret state law
13 and enforce -- or not enforce this subpoena.

14 Google as to the subpoena essentially is asking Your
15 Honor to file -- they have effectively filed a motion to quash
16 as to the subpoena, and they are asking Your Honor to make a
17 determination at this juncture whether or not that subpoena is
18 enforceable under state law. And we would submit that is not
19 only not the role of the federal court. It is premature
20 because the investigation is ongoing, but this whole lawsuit is
21 premised on Google's unilateral interpretation of what they say
22 is in the subpoena and what the Attorney General might do with
23 that information, if it ever received the information.

24 They are saying, no, what we should be able to do is
25 define what we say is in the subpoena, despite the fact that it

1 covers a number of different issues, which I'll go through
2 briefly with the court in a little while, and say, *We can tell*
3 *you, Your Honor, that conclusively everything in this subpoena*
4 *would somehow be precluded, preempted by federal law.* None of
5 those things confer federal subject matter jurisdiction.

6 So while Google has made at least four different
7 arguments in support of subject matter jurisdiction, if you
8 unpack each one of them, there's no jurisdiction. They first
9 say that federal courts have jurisdiction over suits to enjoin
10 state officials from interfering with federal rights. And in
11 the abstract, that's true. And they cite the *Shaw* case, which
12 cites *Ex Parte Young* for that proposition. But you have to
13 look at the specific circumstances when a federal court can
14 take such action. Merely alleging does not automatically
15 confer subject matter jurisdiction.

16 They next say that Section 1983 creates a federal
17 cause of action against those who interfere with federal
18 rights. We know from a long line of cases that 1983 does not
19 create any federal rights. It only provides a procedural
20 mechanism to enforce other existing rights.

21 Then they say the First and Fourteenth Amendment
22 create federal rights which the states may not interfere.
23 Again, a general abstract proposition may be true, but we have
24 to look at the specific facts.

25 And then finally they say federal statutes that

1 preempt state law, like the Communications Decency Act,
2 Copyright Act and the Food & Drug Cosmetics Act preempt any
3 claims that the Attorney General might bring in the future as a
4 result of his investigation. So just to get here today, we
5 have to string about three "what if"s together. What if the
6 Attorney General's investigation continues, and what if as a
7 result of that investigation the Attorney General at some point
8 in the future makes a decision that there is a basis under the
9 Mississippi Consumer Protection Act to institute some type of
10 legal action and then does so and then at that point that there
11 might be an actual complaint, then some of these defenses that
12 Google has raised may be just that, defenses. But they don't
13 give entrance to the federal courthouse.

14 Now, you heard a lot of discussion about the
15 Communication Decency Act, and service providers like to talk
16 about the broad immunity that it provides. And the cases are
17 clear as to what it does and what it doesn't protect. And so
18 the Communications Decency Act really fall into two buckets.
19 There's activity that immunizes Internet providers such as
20 Google from suit, and then there's a second bucket, activity
21 that is not immunized. And we cite the cases in our papers
22 that show where motions to dismiss by Internet service
23 providers, including Google, have been denied, where the issue
24 was whether or not the conduct was for actions that were not
25 immunized.

1 So we know the CDA is not a complete immunity statute.
2 We also know that the CDA is not a complete preemption statute.
3 The reason this is critical for the jurisdictional analysis, as
4 to the CDA, as to the Copyright Act and as to the Food & Drug
5 Act, is that the only way preemption can establish federal
6 subject matter jurisdiction is if it's complete preemption.

7 We cite a line of cases which has long been held,
8 *Caterpillar v. Williams*. The supreme Court says that complete
9 preemption is the basis for invocation of federal subject
10 matter jurisdiction. Under the Complete Preemption Doctrine,
11 the court has concluded that the preemptive force of a statute
12 is so extraordinary that it converts an ordinary state common
13 law complaint into one stating a federal claim.

14 Now, there's two problems here with their preemption
15 argument. Number one, we don't have a state court complaint
16 for jurisdictional purposes to even analyze. They want you to
17 analyze a subpoena and say, *Based on our interpretation of the*
18 *subpoena we think everything in it is preempted and that*
19 *provides jurisdiction.*

20 Well, the CDA is not a complete preemption statute.
21 In fact, Section 230(e) of the CDA says, "Nothing in this
22 section shall be construed to prevent any state from enforcing
23 any state law that is consistent with this section." So
24 Congress did not intend the CDA to preempt every consumer
25 protection statute. It certainly doesn't preempt the

1 Mississippi Consumer Protection Statute, and most importantly,
2 Google does not allege that the Mississippi Consumer Protection
3 Statute or any part of it is preempted. They don't allege that
4 the Consumer Protection Act is facially or as applied is
5 unconstitutional, which is also significant.

6 They talk about the Attorney General's inquiry.
7 That's the term of art they use repeatedly throughout their
8 papers, the Attorney General's inquiry. And they couldn't --
9 and they know they couldn't argue that the Consumer Protection
10 Act is unconstitutional, and they don't allege that it's
11 preempted. They just talk in generalities about the CDA
12 provides broad immunity, and they say that parts of the
13 subpoena may be preempted by the Copyright Act, or parts of it
14 may be preempted by the Food & Drug Act. For jurisdictional
15 purposes, that is not complete preemption. So we would submit
16 all of these arguments about the CDA when we're talking about
17 subject matter jurisdiction they have not met that.

18 We cite *Franchise Tax Board* to the court. *Franchise*
19 *Tax Board* and the *Shaw* decision, which they rely on in their
20 papers they were actually decided on the same day and they were
21 sort of looking at two sides of the same coin. When in
22 *Franchise Tax Board*, the state -- in that case, the state was
23 seeking to regulate some activity, and the party raised the
24 defense and they said, *Well, you have to look at the character*
25 *of the state complaint, not at the character of the federal*

1 defense.

2 As far as subject matter jurisdiction and Google's
3 arguments, I've already touched on the *Shaw* decision. We
4 addressed these cases in depth in our brief. They talked about
5 *Morales*. And I want to address *Morales*. In *Morales*, the
6 National Association of Attorneys General issued some
7 guidelines following airline deregulation, and those guidelines
8 addressed specific things such as the regulation of fares,
9 routes, advertising. Well, when it made its way to the Supreme
10 Court, the Supreme Court said, *We have no trouble in saying*
11 *that those written regulations are expressly preempted by the*
12 *Airline Deregulation Act. The provision in the Airline*
13 *Deregulation Act said that states shall not be able to*
14 *regulate fares, routes, rates, et cetera.* That's not this
15 case.

16 Google also relies on the *Cuomo* decision. That is a
17 case where the Attorney General of New York was enjoined in an
18 investigatory phase. The Attorney General had made demand on
19 national banks in lieu of a subpoena for documents. Several of
20 the banks sought an injunction and said, *Under the National*
21 *Banking Act and the regulations interpreting the National*
22 *Banking Act issued by the comptroller of the currency,*
23 *visitorial powers are expressly preempted by the National Bank*
24 *Act.* And it's also worth noting that the National Bank Act --
25 I believe Section 1985 of the National Bank Act -- the National

1 Bank Act is one of the three statutes that the Supreme Court
2 has held expressly preempts and completely preempts state law.
3 So the Attorney General's action in that case by asking for
4 that information ran squarely into the express preemption of
5 the National Bank Act. That's not this case.

6 They can't point to any particular statute, not the
7 CDA, not the Copyright Act, not the Food & Drug Act that says
8 that the Attorney General's activity in issuing a subpoena
9 under state law is preempted.

10 They cite to the *Crist* case, *Major League Baseball v.*
11 *Crist*. In that case, the Attorney General sought to subpoena
12 documents from a major league baseball team concerning the
13 business of baseball. Major league baseball enjoys federal
14 antitrust exception status. They are not subject when it comes
15 to the business of baseball from federal antitrust regulation.
16 In that case, the court said, *We can see on the face this*
17 *complaint -- on the face of this subpoena that it is only*
18 *seeking information related to the business of baseball, and*
19 *because that activity is perfectly legal under federal law,*
20 *we're not going to let you investigate under state law.*

21 That was a facial determination as to that subpoena.
22 They can't make a facial -- they cannot make that facial
23 argument. And while they try to say and suggest to the court
24 that you can look at this 79-page subpoena and find that it is
25 facially preempted, that's simply not the case.

1 They also cite some cases that the court has
2 jurisdiction under the supremacy clause. They site *Planned*
3 *Parenthood of Houston v. Sanchez*. In that case, the court
4 held -- the Fifth Circuit held that there was a private right
5 of action where a state law purportedly conflicts with the
6 federal statute. We don't have that situation here. They do
7 not contend that state law conflicts with the federal statute.
8 They talk about the Attorney General's inquiry.

9 So these cases they cite for the proposition that the
10 court has jurisdiction, all the cases they cite involve a
11 conflict between federal and state law or where a party has
12 moved or challenged directly the constitutionality of a
13 statute. Specifically, they cite three different cases
14 involving Backpage: *Backpage.com v. McKenna*, *Backpage v.*
15 *Cooper* and *Backpage v. Hoffman*.

16 In all of those cases, it dealt with a situation where
17 the plaintiff challenged the constitutionality of the state law
18 as it related to the sale of certain sexually oriented
19 advertisements. Again unlike Backpage, Google does not
20 challenge the constitutionallity of Mississippi's Consumer
21 Protection Act or any other act. They simply want to stop the
22 Attorney General's inquiry. That's not the basis for federal
23 subject matter jurisdiction.

24 Google also cites *Braniff v. Florida Public Service*
25 *Commission*. And in *Braniff*, it's the same thing. It was a

1 challenge to a state statute, challenge that they sought an
2 injunction saying the state statute was unconstitutional under
3 federal law. They do not do that here.

4 Now, they make an interesting argument in a footnote
5 to their brief, and they say that -- in fact, they say,
6 "Google's complaint alleges that in applying the MCPA," the
7 Mississippi Consumer Protection Act, "to bar Google from making
8 third-party content available to Internet users violates the
9 First Amendment and is preempted by the CDA. And they cite to
10 several paragraphs of their complaint that they allege stand
11 for that proposition. They do not allege anything infirm about
12 the Mississippi Consumer Protection Act. They don't challenge
13 the Attorney General's authority to issue a subpoena under the
14 act. They object to the scope of the subpoena, and that's why
15 I said earlier, this is essentially a motion to quash, which
16 should be litigated in state court.

17 They concede that the Attorney General has the
18 authority to issue this subpoena. You heard earlier this
19 morning that they asked that it be scaled back. There again,
20 that completely undercuts any argument that they can say the
21 subpoena is preempted. They don't challenge any aspect of
22 state law as being preempted by any of the federal regulatory
23 framework. As I said, they allege that the First Amendment --
24 1983 gives them a basis, but 1983, as Your Honor well knows, is
25 only a procedural vehicle to support another constitutional

1 claim.

2 You heard a lot about the First Amendment, a lot about
3 threats, and a lot of intimidation and the like. Google says
4 that the Attorney General's threats of litigation have chilled
5 their speech and the subpoena was issued in retaliation for
6 Google not removing content that the Attorney General claims --
7 that he claimed were deemed unlawful. First off, general
8 threats by governmental officials to enforce those laws which
9 they are charged to administer do not create the necessary
10 injury in fact for this type of First Amendment challenge. We
11 have cited the court to those cases in our papers.

12 Furthermore, initiation of criminal investigation in
13 and of itself does not implicate a federal constitutional
14 right. Further, the constitution does not require evidence of
15 wrongdoing or reasonable suspicion by suspect before the
16 government can begin investigating. But, here again, they are
17 asking the court to tell the Attorney General that he cannot
18 investigate as it relates to this subpoena that they want to
19 say somehow might be preempted or they might have defenses to
20 later on.

21 Google alleges that these threats constitute chilling
22 and that as a result they took action, as he suggested, to
23 mollify, I think was the term that was used. And he also said
24 that the absence of evidence from the side of the Attorney
25 General on this point was deafening, that the only evidence in

1 the record is evidence of chilling.

2 Now, the two affidavits that were submitted by Google
3 employees were submitted in response to the Attorney General's
4 motion to dismiss where the Attorney General suggested that
5 there had been no demonstrated showing of any injury as a
6 result of their alleged chilling claim. But, in fact, it's
7 Google's own correspondence to and from the Attorney General
8 that provides the evidence that the court should look at in
9 terms of exactly how Google viewed its interactions with
10 General Hood as well as other Attorneys General that were
11 taking part in these discussions. I'm going to have to do this
12 the old fashion way. I don't have anyone assisting me with my
13 technology.

14 THE COURT: All right.

15 MR. MIRACLE: This was a letter that was sent to
16 General Hood on June 26, 2013. The affidavit that was
17 submitted in response to the motion to dismiss, stated starting
18 in April of 2013 General Hood's actions were having a chilling
19 effect on Google. But if you look at what Google is telling
20 General Hood, in the second -- third full paragraph, second
21 sentence, "Google has voluntarily and in good faith made
22 considerable strides in addressing the kind of issues raised at
23 your meeting." This is after the chilling conduct allegedly
24 started. "Google has voluntarily and in good faith." I don't
25 think that suggests chilling.

1 Now, it might be argued and it was suggested this
2 morning that these steps were being taken to mollify the
3 Attorney General, but I think the clear language shows that
4 Google knows there was steps that needed to be taken and should
5 have taken and were taken at the prompting of Attorneys
6 General.

7 This is the same letter of June 26, 2013. Last
8 sentence in the first paragraph, "Google has also voluntarily
9 and without prompting restricted advertising related to health
10 supplements, weight loss drugs, and anabolic steroids." Again,
11 Google is recognizing in discussions with the Attorney General
12 that there are steps that need to be taken, and what are now in
13 litigation being couched as threats in the correspondence
14 during the earlier phases of this were clearly Google's own
15 words saying, we recognize these things need to be done and
16 we're doing them and we're doing them at our own prompting.
17 We're not doing them because you're threatening us.

18 This is a letter dated February 21, 2014, almost a
19 year after the affidavits indicate or suggest that there was
20 some type of chilling effect. And this is a letter from
21 Mr. Kent Walker to General Hood and other Attorneys General in
22 response to correspondence from them.

23 On page 2 of this letter under "additional steps,"
24 Google is advising General Hood and the other Attorneys General
25 that "Moreover, I am pleased to be able to tell you that Google

1 has already taken steps directly in response to some of the
2 specific concerns you've raised." "I am pleased to be able to
3 tell you," does not sound like the type of chilling that's
4 being arguing here.

5 Let's look at exactly what it is that they were glad
6 to tell the Attorneys General. "Given your feedback in Denver,
7 we expanded our autocomplete policies to cover even more
8 predictions relating to the sale or promotion of dangerous and
9 illegal activities, including drugs, (prescription or illegal)
10 slavery and sex trafficking, murder and terrorism. We have
11 since removed over 1200 predictions from autocomplete,
12 including things like how to become a drug dealer, how to get
13 away with robbing a house, and buy slaves, among others."

14 Those are things that Google recognized, rightly so,
15 that needed to be done. No chilling shown in this evidence.
16 This is before suit was filed. This is the evidence that the
17 Attorneys Generals were working with them. They were asking
18 that things be done that were pointed out to them, and there
19 are obviously areas that needed to be done.

20 We'd like to back up and just now where this really
21 started. You didn't hear anything about it this morning but in
22 2011 Google entered into a nonprosecution agreement with the
23 federal government. That's an exhibit to our brief. And you
24 heard a lot of discussion about there's nothing that the
25 Attorney General can investigate Google for under Mississippi

1 law that wouldn't be covered by one of their federal defenses.
2 That's just not true.

3 In the nonprosecution agreement, Google admitted that
4 it helped optimize the advertising campaigns for illegal
5 pharmaceutical sales. From 2013 to 2009 Google provided
6 customer support to some of the Canadian online pharmacy
7 advertisers to assist them in placing and optimizing this
8 ad-word advertisements and improving the effectiveness of their
9 websites. And the way the federal government uncovered some of
10 this was through e-mails between Google employees and the
11 Canadian pharmacies.

12 While we're not here talking about the specifics of
13 the nonprosecution agreement, what we are here talking about is
14 the kind of conduct sought in the subpoena that make similar
15 kind of conduct that Google is assisting or facilitating or
16 doing something that may be in violation of the Mississippi
17 Consumer Protection Act. All you've heard is that everything
18 in the subpoena is related to third-party content, which is
19 immune under the CDA. We don't dispute what the CDA says. We
20 don't dispute what the cases say about the CDA. What we do
21 dispute is that the subpoena does not only ask for information
22 that would go to protected content of the CDA.

23 The nonprosecution agreement itself shows that without
24 this kind of information, this kind of conduct would have never
25 come to light. And it's no secret, and Google attached the

1 nonprosecution agreement to their papers. It's no secret they
2 paid \$500 billion to resolve that litigation. And while they
3 didn't discuss it this morning, they attached a PowerPoint
4 presentation that General Hood did in 2013 where General Hood
5 made a presentation to the National Association of Attorneys
6 General showing the kind of conduct that he was concerned
7 about.

8 And he showed where investigators from the Mississippi
9 Attorney General's office were able to make illegal drug
10 purchases, drugs without prescriptions, through ads placed on
11 Google platforms. I don't see that to rehash old issues, but
12 once the Attorney General started to see this kind of
13 information and see the ability to buy counterfeit material, to
14 buy potentially counterfeited drugs, then, yes, he had a duty
15 under state law to start investigating that more vigorously,
16 which is exactly what he did.

17 So this notion that everything in the subpoena somehow
18 magically falls into some preemptive federal statute couldn't
19 be further from the truth. And we have submitted as part of
20 our papers screenshots that our investigators were able to do.
21 Those were actually done on December 17th of 2014, showing
22 particularly on the YouTube platform monetized ads where an ad
23 appears out in the right-hand column next to a video that may
24 be showing what is illegal content. And Your Honor will see
25 those when you review our pleadings.

1 How to make crack. How to buy fake credit cards. How
2 to hack Facebook accounts. Those are things our investigators
3 on December 17, 2014, were able to see, just two days before
4 this lawsuit was filed. If those monetized ads -- if Google is
5 assisting or doing some of the things you they were doing that
6 led to the nonprosecution agreement, that clearly could give
7 rise to potential liability under Mississippi's Consumer
8 Protection Act. That's what we're seeking here. That's what
9 we want.

10 The CDA, as I mentioned earlier, does not protect
11 online service providers from everything. "Service providers
12 such as Google can be held liable for various torts or crimes
13 that they themselves commit, such as fraud and
14 misrepresentation." That comes from the *CYBERsitter, LLC v.*
15 *Google, Inc.*, cases cited in our papers. There the court
16 denied Google's motion to dismiss on the CDA immunity holding
17 that although Google was not an information service provider
18 with respect to the ad-words advertisement at issue, the CDA
19 was inapplicable to the extent that Google engaged in tortious
20 conduct separate and apart from the contents of the ads. And
21 there are others.

22 Now, Google's own YouTube community policy guidelines
23 say we draw the line at content that's intended to incite
24 violence or encourage dangerous illegal activities that have an
25 inherent risk of serious physical harm. That comes from their

1 own YouTube community guidelines. If through this
2 investigation the Attorney General finds evidence that
3 contradicts those statements, then clearly under the MPCA there
4 would be potential liability. The Attorney General has the
5 right, the duty under the Mississippi law to investigate that,
6 and that's what he's doing.

7 So I would like to now turn to why it is Google says
8 they can come to federal court. We have moved to dismiss this
9 complaint under 12(b)(1) and 12(b)(6) for failure to state
10 subject matter jurisdiction. Now we know that federal subject
11 matter jurisdiction is not satisfied merely because the dispute
12 in some way is connected to a federal matter. And we know from
13 the U.S. Supreme Court in *Wycoff* that federal courts will not
14 seize litigation from state court merely because one who is
15 normally the defendant goes to federal court to begin his
16 federal law defense before the state court begins the state law
17 case. That's exactly what we have here.

18 Now, you're probably going hear in rebuttal about
19 *Wycoff*: That's dicta, and that's not the holding. But Your
20 Honor well knows from a number of cases involving declaratory
21 judgment acts that whether it's in the removal context or
22 whether it's in the anticipation of a state law case, a defense
23 to that potential state law case will not confer federal
24 subject matter jurisdiction, and we have cited a number of
25 cases in our papers.

1 Jurisdiction means the kinds of issues which gives the
2 right to entrance into federal court. In order to confer
3 subject matter jurisdiction, a party's legal interest must
4 relate to the actual claim arising under federal law. And
5 under *Wycoff* and its progeny *Garr*, a Fifth Circuit case, where
6 the plaintiff in the federal dec action is merely anticipating
7 what the state law plaintiff might do, that is not enough to
8 confer federal subject matter jurisdiction. It's the
9 character -- under *Franchise Tax Board*, it's the character of
10 the state law claims, not the character of the federal
11 declaratory claims.

12 And so what would be the character of the state law
13 claims here, or the state's claims here? They would arise
14 under the Consumer Protection Act. It doesn't matter that
15 those claims may touch on or be related to the CDA or the
16 Copyright Act or the Food & Drug Act. That does not confer
17 federal subject matter jurisdiction. If the state had filed
18 its case before Google filed its dec action, the court would at
19 least have a complaint to look at to say whether or not we have
20 tried to fit ourselves into the well-pled complaint rule, and
21 the court would be able to analyze whether or not the state was
22 trying to plead around what were federal claims. We don't even
23 have that here. We have a subpoena that Google has interpreted
24 as giving federal subject matter jurisdiction.

25 These claims that Google has brought do not arise

1 under federal law. They may be federal defenses if and when
2 the Attorney General files suit in state court, but they are
3 not claims arising under federal law.

4 In *Wycoff*, the court said, "The plaintiff's idea seems
5 to be that it can now establish the major premise of an
6 exception not as an incident of any present declaration of any
7 specific right or immunity but to hold in ready for use should
8 the commission at any future time attempt to apply any part of
9 a complicated regulatory statute to it." That's exactly what
10 Google is asking you to do, Your Honor. They are asking you to
11 issue an injunction over a subpoena over a suit that has not
12 yet been filed and declare that the Attorney General will be
13 forever foreclosed from further investigating Google as it
14 relates to that subpoena or from filing suit.

15 The court in *Wycoff* said --

16 THE COURT: Say that again.

17 MR. MIRACLE: I'm sorry?

18 THE COURT: Say that again, what you are contending
19 that Google is asking here. I didn't read their request to go
20 that far.

21 MR. MIRACLE: They are certainly asking Your Honor to
22 enjoin any further -- as it relates to the application of this
23 subpoena. They are asking you to declare their rights that the
24 Attorney General cannot enforce that subpoena.

25 THE COURT: At present.

1 MR. MIRACLE: At present. Before it's even been
2 enforced under state law, for that matter.

3 THE COURT: But I didn't read that request to say that
4 Google is asking this court to forbid any further inquiries or
5 investigation but to hold the matter in stasis until the court
6 can hear some of these matters on the merits.

7 MR. MIRACLE: Well, certainly the relief they are
8 requesting is that the court declare the subpoena invalid for
9 the various federal defenses that they have raised. In the
10 short run, yes, they certainly want you to hold it in stasis.
11 But obviously the relief they are seeking is a declaration that
12 the subpoena and the Attorney General's investigation have to
13 be stopped.

14 THE COURT: So then what is your position as to
15 whether any of the inquiries in the subpoena violate the CDA?

16 MR. MIRACLE: I think that begs the jurisdictional
17 question, Your Honor. And I would like to point the court's
18 attention to the *NOPSI* as it's referred to, the *New Orleans*
19 *Public Service Commission* case where the Supreme Court
20 addressed this issue in the context of *Younger* abstention. And
21 one of the arguments that was raised there was that the court
22 should take a look and see -- at the issue to see whether or
23 not it was preempted. And the Supreme Court said that which
24 the court has to look at and determine factually, that it can't
25 be complete preemption.

1 So if Your Honor has to get to the point of looking at
2 the subpoena to see whether there are things in it that are or
3 aren't part of CDA or other, they lose. There's no complete
4 preemption. If the court has to make a factual determination
5 for jurisdictional purposes, then there is no preemption, and
6 there is no subject matter jurisdiction. So the answer to the
7 court's question would be my position is there's no subject
8 matter jurisdiction. The court should not get to the question
9 of what parts of the subpoena are preempted or not preempted.
10 That would beg the entire question, and that's why we're asking
11 the court to dismiss the case in the first instance.

12 A state court -- if they want to raise these issues in
13 state court, the state court should decide -- and they will
14 have the opportunity raise those in state court -- whether or
15 not they have a defense to some of these issues. So that's
16 why -- what we are really doing here is arguing a motion to
17 quash a subpoena before there's been a determination that
18 subject matter jurisdiction has been conferred.

19 I hope that answers the court's question, but that's
20 my contention is the mere fact that the court would have to
21 look and see whether or not some of these things are preempted
22 or not precludes a complete preemption analysis for subject
23 matter jurisdiction purposes.

24 THE COURT: Well, let's look at the CDA. The Attorney
25 General of Mississippi was one of the signatories to a letter

1 dated July 23rd, 2013, that was addressed to Senator
2 Rockefeller, Senator Thorne, Representative Upton and
3 Representative Waxman. Do you agree with that, that he was
4 among other Attorney Generals who authorized this particular
5 letter or at least signed it?

6 MR. MIRACLE: Yes, Your Honor.

7 THE COURT: Does this authorship or signatory by the
8 Attorney General weaken your argument here about the thrust and
9 the breadth of the CDA?

10 MR. MIRACLE: No, Your Honor, I don't believe it does.
11 And I think the cases are manifestly clear that the CDA -- the
12 activity under the CDA can fall into either protected or not
13 protected conduct. So I want to make sure I'm clear in my
14 articulation of why at the subject matter jurisdiction
15 preemption phase the CDA doesn't get them into federal court.
16 There's no complete preemption. The only argument they have
17 made is they have made a determination that the subpoena only
18 asks for things that they say would be preempted, and they try
19 and couch that in terms of everything in the subpoena relates
20 to information posted by third parties.

21 We're still in the investigation stage. They don't
22 get to make that determination. The Attorney General has
23 issued a subpoena. It is enforceable under state law. If they
24 want to make those claims, then they should litigate that in
25 state court where that should be adjudicated before we get to

1 the -- so if we're arguing over the scope of the subpoena and
2 whether or not certain things are preempted or not preempted or
3 immunized by the CDA, that conversation would be had in state
4 court.

5 THE COURT: I'm looking at the immunity provided by
6 the CDA and whether any such immunity prohibits the conduct of
7 the Attorney General here.

8 MR. MIRACLE: No, Your Honor.

9 THE COURT: So I'm looking at the content of the
10 letter which seems to suggest that the CDA ties the hands of
11 the Attorney Generals in the same regards you're arguing and
12 that instead the Attorney Generals who signed the letter are
13 requesting an amendment to 47SC Section 230(e)(1) and that this
14 amendment, if adopted, would then say that nothing in this
15 section shall be construed to impair the enforcement of
16 Section 223 or 231 of this title, Chapter 71 relating to be
17 obscenity or 110 relating to sexual exploitation of children of
18 Title 18 or any other federal or state criminal statute.

19 Now, does this letter signed by the Attorney General
20 of Mississippi, among others, weaken your position here as to
21 the reach of the CDA?

22 MR. MIRACLE: No, Your Honor, I don't disagree with
23 what the CDA immunizes. And I think the cases have been pretty
24 clear about what the CDA does and doesn't immunize. So I don't
25 think the fact that they are requesting some changes undermines

1 our position, and I think it's important -- I think Your Honor
2 asked about does the CDA limit the ability of the Attorney
3 General's inquiry here. And one thing I want to point out is
4 nothing in the CDA preempts an investigation by the Attorney
5 General. So at the stage we are in right now, which is the
6 investigatory stage, nothing in the CDA stops the Attorney
7 General from investigating.

8 And the way this process should work, if Google
9 objected to the subpoena, they could have gone into state
10 court. Now, if they didn't respond, the Attorney General has
11 the option under the statute to go to the Hinds County Chancery
12 Court and enforce that subpoena. When I indicated in our
13 papers that this is not a self-executing subpoena, that simply
14 means that if the party in this case, Google, doesn't respond
15 or chooses not to respond, they are not held in contempt.
16 There's no legal consequence.

17 Then the Attorney General has to go to chancery court
18 and enforce that subpoena at which time Google would have an
19 opportunity to raise these very issues. That's the way this
20 should have worked, not to come to federal court and try to
21 stop an investigation before it has been concluded, before they
22 have had to turn over any documents. So I don't think the
23 letter, and I don't think the interpretation of the CDA has any
24 impact at the investigatory stage of where we are right now.

25 THE COURT: Is it the position of Google that the

1 Attorney General here cannot commence such an investigation if
2 Google's activities are protected by the CDA -- and one other
3 thing, and that to intrude at this point then would amount to a
4 diminution or at least a violation of the particular broad
5 immunity that's allowed Google in this context?

6 Now, I was asking you whether this letter that was
7 signed by the Attorney General here weakens your position here
8 with regard to the reach of the CDA. Does the CDA then
9 immunize in such a fashion that would broadly prohibit the
10 investigation into areas that are already immunized? And if
11 that is the case, then the inquiry is forbidden. So with
12 regard to what the Attorney General here signed, did he not
13 sign the letter which says that the CDA has broad proscriptions
14 with regard to prosecutions of Google with regard to the
15 matters here? So what's your response to that?

16 MR. MIRACLE: My response to that would be twofold.
17 First I think the case would be different if we were here
18 having filed a lawsuit in state court which then Google
19 presumably would have removed and claimed the same CDA
20 immunity. In that case, the court would have a specific set of
21 facts to look at. The court would have a specific set of
22 causes of action to look at. And the defenses -- but I think
23 the distinction I'm trying to draw is that in the investigation
24 stage for a party to be able to say, We've looked at the
25 subpoena, we've decided that everything you're asking for is

1 immunized and that we're going go to federal court and get an
2 injunction to keep you from any further investigation, I don't
3 think any case or any reading of the CDA has any restrictive
4 effect on the investigation.

5 I mean, Google has already assumed that if they comply
6 with the subpoena and if they turn over documents, they've
7 already then assumed a lawsuit is going to be filed before the
8 Attorney General has had the opportunity to even make that
9 decision. So my response to the question is, A, I think it
10 would be different if we were looking at an actual complaint
11 and an actual concrete set of facts that the court would be
12 able to look at and say as a matter of law those are -- Google
13 is immunized from that.

14 But how can we say -- we don't have documents. We
15 don't have anything to look at to say whether or not this
16 particular type of conduct falls in or outside the CDA's
17 immunity. I don't think Google contends that the CDA immunizes
18 it from every single bit of activity. Courts have dismissed
19 claims where there is at least the argument that the activity
20 is of their own potential fraud or misrepresentation, not just
21 hosting third-party content.

22 So that's when I started my conversation off earlier
23 about the two buckets. We have bucket of immunized activity,
24 which I don't dispute, but there is a potential that there is
25 another bucket of activity that's not immunized. So the

1 impairment of the investigation at this point to say, You can't
2 even look, you can't even ask whether or not there's
3 information that may lead to unimmunized activity I think is
4 completely improper.

5 THE COURT: So what was the purpose of this letter?

6 MR. PIZZETTA: I think the purpose of the letter was
7 that obviously the Attorneys Generals collectively wanted to
8 see changes made to the CDA.

9 THE COURT: Changes made to what?

10 MR. MIRACLE: Well, even as written, I think -- and I
11 can't speak for the other Attorneys Generals. But even as
12 written --

13 THE COURT: Well, just speak to the letter itself
14 that's signed by the other Attorney Generals.

15 MR. MIRACLE: I think the Attorney Generals are trying
16 to enforce their consumer protection and other laws, criminal
17 laws and otherwise, I'm sure from their perspective feel like
18 it does provide a limitation in some respects. But that
19 doesn't mean there aren't areas that they can't probe into. So
20 I don't think the fact that they were asking that there be
21 changes made and whether it was in reaction to court decisions
22 that were coming out and how the CDA was being interpreted.
23 But the point is important to stay -- from our perspective to
24 stay focused on is that at this stage of the proceedings how is
25 the court going to make a determination based on this subpoena

1 that there's not a single piece of information out there that
2 could be responsive to the subpoena that would not fall under
3 the CDA immunity.

4 That's our primary objection here. We simply want to
5 conduct an investigation. And if Google objected to the
6 subpoena, we could have had that conversation in state court.
7 But to trump a state investigation by coming to federal court,
8 they have still got to have jurisdiction. And we contend that
9 based on a subpoena, there's simply not complete preemption
10 under any set of facts or circumstances that they have alleged
11 that would then allow the court to look at this.

12 But then back to the court's earlier question about do
13 we contend there's anything in the subpoena that wouldn't be
14 preempted by the CDA. Well, that's a two-part answer. One,
15 yes, we have reason to believe there would be things that would
16 not be preempted. And the second part of that answer is we
17 certainly believe we have the right to find out. And we think
18 it's -- you know, when we talked about the public interest,
19 it's inherently dangerous for a company to be able to say or
20 any individual who falls within the Consumer Protection Act's
21 reach to say we've gotten wind of an investigation, we've
22 gotten the subpoena. We think it's chilling our First
23 Amendment speech or whatnot, avoid state court altogether and
24 run off to federal court and get an injunction. We just think
25 that's highly improper, Your Honor.

1 THE COURT: Are you trying to run way from this
2 letter?

3 MR. MIRACLE: No, Your Honor.

4 THE COURT: All right, then. So back to the letter.
5 What was the thrust of this letter?

6 MR. MIRACLE: Your Honor, other than what the letter
7 says -- and being candid, other than what the letter says, I
8 really can't interpret it any further than what the letter
9 says.

10 THE COURT: So the letter was written to ask for
11 changes to the CDA so as to allow lawsuits like the ones that
12 Google here fears could take place. Is that your reading of
13 the letter?

14 MR. MIRACLE: I certainly think the reading of the
15 letter is such that they are asking that it allow types of
16 suits that had been interpreted as not being permitted under
17 the CDA.

18 THE COURT: Okay. And then if those suits were
19 correct, if those interpretations were correct, then service
20 providers such as Google then enjoy certain immunity bestowed
21 by Congress.

22 MR. MIRACLE: For claims against them arising of
23 hosting of third-party content.

24 THE COURT: Exactly. So that immunity then would
25 embrace those service providers, but then if the immunity is

1 bestowed by Congress, does just that, and if there's some
2 attempt then to make inquiries into matters that will fall into
3 these categories, would that not be a violation of Google's
4 rights?

5 MR. MIRACLE: Well, not for purposes of subject matter
6 jurisdiction. It may be a defense.

7 THE COURT: I'm going to come to that.

8 MR. MIRACLE: It may be a defense. In fact, we cited
9 in our papers a decision last year, a federal court case
10 involving Facebook where the district -- circuit of the
11 District of Columbia interpreted the CDA as an affirmative
12 defense. So if the suggestion by Google would be that the CDA
13 immunity is a complete preemption or some type of sword of
14 being an authorization to file suit in federal court to enforce
15 its rights, at least one circuit court has said it's an
16 affirmative defense that may be raised.

17 The only reason that case was in federal court was
18 because it was removed on diversity grounds. It wasn't even
19 there on federal jurisdiction grounds. So I think we have an
20 indication of how courts are viewing the CDA, not as a sword
21 but as a shield. So when you're bringing a dec action under
22 2201, there's got to be some kind of underlying federal subject
23 matter jurisdiction. The CDA doesn't provide that, even though
24 courts have said in suits against it if you're going to sue a
25 service provider for matters that are simply hosting

1 third-party content, courts have said that is what the immunity
2 covers.

3 It doesn't cover immunity for their own actions, for
4 their own fraudulent actions, and that's why I alluded to the
5 nonprosecution agreement. It is fine to say we have these
6 immunities and we don't do these things, but I think we're
7 entitled to at least look at the evidence to see, in fact --
8 there's no question that they can't avoid Mississippi's consume
9 protection laws simply by invoking the CDA because --

10 THE COURT: If Google is clothed with immunity under
11 the CDA, then an attempt to remove those clothes would be a
12 violation, wouldn't it?

13 MR. MIRACLE: If a suit was brought against them that
14 simply covered matters that were hosting of third-party
15 content, if that's all it was, then courts have said there's
16 immunity. But as to the cases that I cited earlier, the one
17 where Google's motion to dismissed was denied, the court said
18 they are not immune for their own conduct, own fraud and
19 misrepresentation.

20 THE COURT: So any inquiry should be directed only at
21 Google's conduct but not that of third parties. Is that
22 correct?

23 MR. MIRACLE: As it relates to the bringing of a suit.
24 I don't think there's any authority to say that they can't be
25 investigated and that --

1 THE COURT: How can you investigate it if they have
2 immunity?

3 MR. MIRACLE: They can assert it as a defense, if
4 there's a lawsuit -- I guess this goes back to my concern that
5 we're litigating this in the abstract. Google knows what
6 documents it has and doesn't have. The Attorney General
7 doesn't. The Attorney General used a valid lawful state law
8 subpoena power to ask questions to get the information, and the
9 courts in these types --

10 THE COURT: Let's not talk about the abstract then.
11 Let's talk about something concrete. What about the comments
12 of the Attorney General about why he wanted this information,
13 and his determination that Google is in violation of various
14 laws? Did he say that Google itself was doing this or that
15 Google was in violation of the laws because of its placements
16 of ads by third persons?

17 MR. MIRACLE: I think the evidence that was derived
18 from the nonprosecution agreement, the fact that he was able to
19 make -- his investigators were able to make drug purchases
20 after that nonprosecution agreement was entered into certainly
21 gave him at least reason to believe there was activity that, A,
22 was the type of activity that they were found to have been in
23 violation of when they entered into that nonprosecution
24 agreement. That all was an ongoing result of information that
25 his investigators had.

1 And that's all in the record, Your Honor. The
2 PowerPoint presentation with all the types of activities that
3 the Attorney General was concerned about flowing from the
4 nonprosecution agreement, flowing from the fact there were
5 employees who were found to have been engaging in misconduct,
6 found through e-mail communications, things of that nature,
7 that led to that. And I do want to point out because one of
8 the quotes that was put up on the screen this morning had to do
9 with a press conference that the Attorney General gave, and it
10 was suggested that the company is one that clearly should be
11 convicted of a felony. That needs to be put in context, and I
12 think it was a little bit unfair to put that in the abstract
13 like that.

14 And this is in the record already so I won't put it
15 back up on the screen. But the Attorney General was talking
16 specifically about the nonprosecution agreement and the fact
17 that his investigators were able to purchase prescriptions
18 online -- prescription drugs online without a prescription
19 after the nonprosecution agreement had been entered into, and
20 there I was window -- I believe it was a two-year window in
21 that nonprosecution agreement where they could be subject to
22 further liability. The Attorney General was saying, *If my*
23 *investigators one year later were able to go and buy*
24 *prescription drugs online without a prescription, have them*
25 *delivered, bath salts, oxycodone, all of those kinds of things,*

1 *if my investigators were able to do that, then that might be a*
2 *violation of the nonprosecution agreement.*

3 THE COURT: Now, did the Attorney General prosecute
4 those people? I understand that -- I think seven instances or
5 something were identified by the Attorney General and Google
6 removed one from its service and the other six were deemed not
7 to be in violation. But the Attorney General did not take any
8 steps against the actual purveyors of the advertisement. Now,
9 that's in the papers, and it was also repeated here during the
10 argument that this occurred. So in Google's papers, Google
11 made the statement that's made here. Now, is that correct,
12 that there was no prosecution?

13 MR. MIRACLE: The answer to the question as to the
14 drug violations, I don't believe there were any prosecutions.
15 Speaking in the broader context, and this is in the record as
16 well, where the Attorney General has indicated that the reason
17 for that in a lot of cases is that they are either
18 international or they are out of the court's jurisdiction --
19 out of the Attorney General's jurisdiction.

20 THE COURT: Google further makes the comment that the
21 Attorney General didn't even ask for any assistance in moving
22 with the identities of those persons or whereabouts or means by
23 which they could be prosecuted. So did the Attorney General
24 begin any investigation towards prosecution?

25 MR. MIRACLE: Not that I'm aware of in those specific

1 instances. We're not aware of it, Your Honor.

2 THE COURT: So the Attorney General was aggrieved that
3 Google had placed these ads before the public and specifically
4 identified these specific ones. So then after the AG
5 identified them, then the AG took no steps whatsoever to
6 prosecute?

7 MR. MIRACLE: Again, Your Honor, we're not aware of
8 what steps may have been taken on those particular cases.

9 THE COURT: But it is your office though, isn't it?

10 MR. MIRACLE: Yes, Your Honor.

11 THE COURT: All right. And this is a case you've been
12 working on, and I will presume, then, that if some steps had
13 been taken that you would know it. So then should I not
14 conclude that the AG then took no steps?

15 MR. MIRACLE: I cannot say affirmatively one way or
16 the other as to those particular cases, Your Honor. If I
17 could, I would speak further to it.

18 THE COURT: Would you have any theory as to why the AG
19 took no steps after this was a huge issue with the AG on
20 Google's alleged misconduct?

21 MR. MIRACLE: I think the Attorney General's focus and
22 particularly the focus of the consumer investigative division
23 which has been handling this, their focus is to try to as far
24 as the damage or the harm being caused by the consumers in
25 Mississippi to eliminate the prospect of kids or whoever it may

1 be going online and being able to type in, you know, "buy
2 drugs" and it is "buy drugs without a prescription," and what
3 not. And Google has taken some of those steps to no longer be
4 able to do that.

5 So under the Consumer Protection Act that's been the
6 Attorney General's focus as far as the civil side of things is
7 to say we need this activity to stop to protect our consumers
8 from buying counterfeit goods, from buying counterfeit
9 narcotics or whatever the case may be. So I know that's been
10 the Attorney General's focus and effort in that regard.

11 THE COURT: This next question, just for any own
12 edification, it is not necessarily -- and I can't think of why
13 it would be germane to a ruling by the court, but Google
14 constantly has stated in its papers that this action seems to
15 have been pushed by the Hollywood industry and even here made
16 the statement that one of the briefs that was submitted is
17 verbatim from that same industry and that that particular
18 involved party wishes this lawsuit to go forward.

19 Now, when I read the papers, I concluded that
20 seemingly what that third-party is interested in would be
21 pirating or infringement copyrights. Is that it?

22 MR. MIRACLE: Those -- there are those elements of
23 concern, copyright infringements, and pirating. Yes, your
24 Honor, movies.

25 THE COURT: Were there others, other concerns, because

1 that's what I thought that to be when I read the papers. But
2 no one discussed it in detail. Your side didn't discuss it
3 very much at all, whereas Google constantly mentioned that this
4 lawsuit was being fueled by third-party entities such as the
5 one I just mentioned. So is it -- are there other concerns or
6 other directives that these other third parties in that respect
7 would have other than what I just said?

8 MR. MIRACLE: As far as the specific instances, I
9 don't believe so, Your Honor. And I think those arguments --
10 the raising of this issue is a real red herring by Google that
11 someone who the Attorney General has worked with somehow
12 undermines the credibility or whatever the argument is. The
13 Attorney General has acknowledged in his December 18th press
14 conference -- I believe he was asked about that -- you know,
15 the Consumer Protection Division of the Attorney General's
16 office or the criminal division, they work with victims. They
17 don't choose who their victims are. They don't choose who the
18 victims of crime or theft are, but they work with and are
19 assisted by them.

20 So the fact of whether record or recording industry
21 people have concerns about their work being pirated or
22 downloaded for free or whether the Motion Picture Association
23 has those concerns, then certainly they are potential victims
24 of crimes. The people in Mississippi are able to download
25 things for free or are directed to cites that are taking them

1 to things of that nature. Those are things that are of concern
2 to him, and he's going to work with and he's on record saying
3 he's going to work with people in the industries that are
4 affected by those problems. So the notion of raising of this,
5 I simply think is a red herring and somehow designed to cast
6 the investigation in a bad light. But the Attorney General
7 certainly doesn't pick and chose who are the victims of civil
8 or criminal activity, and I think that's simply the case here.

9 And as to Your Honor's larger point, and the subpoena
10 itself is broken down into 14 different categories, which cover
11 things like human trafficking, credit card theft, other types
12 of counterfeiting. So the subpoena has gotten a lot of
13 attention on a few specific things; but as has been pointed
14 out, it is a 79-page subpoena that covers a variety of types of
15 conduct that the Attorney General is concerned about. But
16 counterfeiting and credit card theft and identity theft, all of
17 those things are included in the subpoena and are of paramount
18 concern to the Attorney General in enforcing the consumer
19 protection law.

20 THE COURT: Thank you. I just asked the question,
21 this last one, out of curiosity. That's all. Go ahead.

22 MR. MIRACLE: All right. So, Your Honor, we clearly
23 think that as to the subject matter jurisdiction they have not
24 established subject matter jurisdiction. They have raised
25 defenses in anticipation of what they think a state lawsuit

1 might look like. They said they were neither too early or too
2 late. Well, we clearly think it doesn't matter whether they
3 think they were too early or too late.

4 What we think matters is the predicate for their
5 jurisdiction here was Section 2201 of the Declaratory Judgment
6 Act and Section 1331 and Section 1983. None of the federal
7 defenses that they have raised give rise to federal subject
8 matter jurisdiction. In the event that the Attorney General
9 does at some point in the future bring a lawsuit, that may be a
10 question for removal. I'm sure if a lawsuit is filed, I'm sure
11 the removal will be something that they would look at.

12 But in the absence of any complete preemptive statute
13 here which they cannot point the court to, they simply cannot
14 establish subject matter jurisdiction. And we would also ask
15 the court to dismiss the retaliation claims for the reasons
16 that we have stated in our brief that the evidence before the
17 court does not show any type of chilling activity. It shows
18 that Google was concerned, as they should have been, about
19 things that were on their search engine, and they were working
20 with the Attorneys General.

21 The one thing that's absolutely certain to happen here
22 is if an injunction were to issue, the only thing that would be
23 chilled would be the Attorney General's ability to enforce the
24 consumer protection laws on the basis of a company saying, *We*
25 *think the subpoena is too broad and we think it is preempted by*

1 federal law. That's what would be chilled here is the Attorney
2 General's ability to enforce the consumer protection laws.

3 And so on the basis of that, we certainly do not think
4 that they have met their very high burden of proving that
5 there's federal subject matter jurisdiction. I would like --
6 as Your Honor is probably aware, we have raised *Younger*
7 abstention, assuming the court find there's jurisdiction. We
8 clearly think that the jurisdiction -- the *Younger* abstention
9 factors here are met. Google's opposition to *Younger* stems
10 largely from *Sprint* and their interpretation that under the
11 *Sprint* holding, which was, I believe, in 2014, that the cases
12 relied upon by the Attorney General that these types of civil
13 investigative demands constitutes an ongoing proceeding for
14 *Younger* purposes that *Sprint* somehow invalidated those cases.

15 *Sprint*, you know -- my reading of *Sprint* was that it
16 essentially affirmed the court's decision in *NOPSI*, where *NOPSI*
17 said -- the Supreme Court of *NOPSI* looked at an abstention
18 argument and ultimately in *NOPSI* declined *Younger* abstention.
19 But the key holding in *Younger* -- I mean, in *NOPSI* was the
20 Supreme Court's finding that the action at issue was really
21 legislative in nature. It was not judicial in nature. And I
22 set this out in our brief that in the *NOPSI* decision, the court
23 looked at what exactly is judicial in nature, what constitutes
24 that ongoing criminal -- ongoing process under the first prong
25 of *Younger*.

1 And they quoted extensively from an earlier Supreme
2 Court decision, I believe it was in 1908, and this is in our
3 papers where they talk about judicial in nature being this type
4 of investigative process, exactly what we have here today. And
5 I think it is important to look at the investigation of the
6 Attorney General in the context of the statute and the powers
7 that the Attorney General has under the Consumer Protection
8 Act. He has the authority to issue subpoenas, which he has
9 done. He can call witnesses. He can subpoena documents. He
10 can conduct hearings. He has the authority to enter into
11 what's called assurances of voluntary compliance.

12 And I want to point out -- these are in our papers --
13 but in the last three years Google has entered into two
14 different voluntary compliance agreements with the State of
15 Mississippi and 37 other states Attorneys Generals over matters
16 of concern to the attorneys generals in the states. That was
17 the Attorney General exercising his authority under the
18 Consumer Protection Act.

19 So what we're dealing with here is a statute that is
20 very judicial in nature, that is almost akin to a grand jury
21 type proceeding. And in our papers we point the court to the
22 *Earle* decision, which is where the Fifth Circuit found *Younger*
23 abstention applying in grand jury type proceedings. So we
24 don't think the *Sprint* decision had any dramatic impact on nor
25 limits the application of *Younger* in this case.

1 There's outstanding -- and one of the arguments that
2 they've either already raised or will raise is this tension on
3 the one hand saying there's no jurisdiction because there's no
4 case filed and there's abstention under *Younger* because there's
5 an ongoing proceeding. And while it may appear that there's
6 some tension between those two concepts, certainly if the court
7 doesn't have jurisdiction, the case is over. If the court does
8 decide it has jurisdiction, under *Younger* all the established
9 three-part prong tests of *Younger* are met.

10 So there are really two different inquiries. In a
11 number of courts, a number of district court have held that
12 these types of CIDs are the type of investigatory devices that
13 constitute ongoing proceedings. Google has said, *Well, those*
14 *were pre Sprint cases. And if you read Sprint, then those*
15 *cases are not good law anymore.*

16 We cite a 2414 case in *Empower Texans*, where the
17 district court found these types of CIDs to be the type of
18 ongoing proceedings necessary for an application of *Younger*.
19 Google's critique of that is, *Well, they don't cite to Sprint.*
20 But, again, I think the holding of *Sprint*, I think the holding
21 of *NOPSI* are fully consistent with the type of specific
22 statutory authority that the Attorney General has to conduct
23 these kind of cases.

24 So I think to say in the abstract that an Attorney
25 General might not be deemed to have the type of authority or be

1 conducting the type of investigation that would be consistent
2 with *Younger* principles, I think what's important is to look at
3 the specific application of the Consumer Procedure Act and the
4 authorities that the Attorney General does have. And if you
5 look at those particular authorities, then it clearly satisfies
6 the *Younger* prong that requires an ongoing proceeding.

7 Certainly there's an important state interest here. I
8 don't think anyone disputes that the Attorney General's ability
9 to investigate these types things would constitute a matter of
10 important public interest, which is the second *Younger* prong.
11 And then the third *Younger* prong goes back to something that
12 we've already talked about, is Google's ability to litigate
13 this and raise their constitutional challenges. And the fact
14 that they can raise those in state court is of no moment to
15 whether *Younger* should be applied here. State courts are fully
16 capable and fully bound to apply and enforce the federal law.

17 So the fact that a state court venue would be the
18 available venue for them under *Younger* is -- should be of no
19 jurisdictional consequence. They will have that right to raise
20 that in state court at the appropriate time, at the time this
21 becomes ripe. But to suggest that this court should step in
22 and stop this investigation because there's a chance that some
23 of this activity might ultimately be protected if and when the
24 Attorney General files a lawsuit at some point in the future,
25 we think that's exactly the type of case *Younger* was intended

1 to apply to to allow the state court process to take place.

2 In the absence of that, we'll never know. If this
3 investigation stopped, we'll never know what information may or
4 may not have been responsive or may or may not have been
5 subject to CDA immunity. We'll never know. We think that the
6 Attorney General has the right and the duty and the statutory
7 and constitutional responsibility to conduct this
8 investigation, and we think the argument that the court can
9 somehow look at the subpoena and presume that there may be some
10 things that are later subject to a defense, we submit at this
11 point that would be improper, and we think that's exactly what
12 Google is asking this court to do is to make a facial
13 determination that the subpoena is preempted completely. If it
14 at not completely preempted, if it is not facially preempted,
15 then there's no complete preemption, there's no subject matter
16 jurisdiction. So when we talk about the content of the
17 subpoena, I've tried to reiterate the importance of that to our
18 position relative to subject matter jurisdiction.

19 They've pointed you to the definitional section that
20 talks about issues of whether or not it would be immune under
21 the CDA or not. I think the fact again that the court -- if
22 the court has to examine factually the entire 79-page subpoena
23 and the multitude of requests for production and
24 interrogatories, in order for the court to engage in that fact
25 finding to see exactly what's in the subpoena, is exactly the

1 argument we say takes us out of any kind of complete preemption
2 analysis.

3 And so at the end of the day what we're left with is
4 Google raising defenses to a not yet filed state law claim
5 based on a hypothetical set of facts that they have
6 constructed. They say, *Well, it's not hypothetical. We have*
7 *the subpoena, and we know the kind of claims and we know the*
8 *kind of information they are asking for.* But that doesn't mean
9 that this is the forum to litigate that in. The forum to
10 litigate that in is in state court, whether they move to quash
11 the subpoena in state court or whether the Attorney General
12 ultimately makes the decision to move to enforce that. Those
13 questions should be answered in state court, but they should
14 not be answered in the abstract by the federal court.

15 THE COURT: All right. Thank you.

16 MR. MIRACLE: Thank you, Your Honor, for your time.

17 THE COURT: All right. Rebuttal.

18 MR. NEIMAN: If I could have two minutes for a break.

19 THE COURT: We're in recess for five minute. Five
20 minutes.

21 (Recess)

22 MR. MIRACLE: Your Honor, with the court's indulgence,
23 Mr. Neiman has been kind enough to let me just clarify
24 something. Your Honor was asking me about the letter that
25 General Hood was one of the signatories to about the scope of

1 what the request was. And my colleagues -- I just want to make
2 sure I was on the same page with my colleagues.

3 But I think our point about this letter is it is very
4 specifically tied to child exploitation and child sex crimes.
5 And where the letter says that, "It is ironic that the CDA,
6 which was intended to protect children from indecent materials
7 is now being used as a shield from those who profit from
8 prostitution and crimes against children." So it was a very
9 specific issue that the attorneys general were concerned about.

10 And then in the quoted paragraph from
11 Section 230(e)(1), it's specifically talking about the state
12 criminal statutes that nothing will be construed to prevent
13 states from prosecuting those crimes under the CDA. So I just
14 wanted to clarify if I didn't articulate it as well as I
15 probably could or should have in response to your question that
16 this letter was very specifically limited to one particular
17 area and was in no way any type of concession that the
18 attorneys general were conceding or that General Hood was
19 conceding in any way that the CDA was precluding his ability to
20 enforce the Consumer Protection Act. Thank you.

21 THE COURT: Thank you. Response.

22 MR. NEIMAN: Thank you, Your Honor. I just want to
23 start with the letter we just talking about and ask the
24 question. I think Mr. Miracle was trying to suggest that the
25 CDA perhaps was not -- did not create some kind of immunity

1 from investigation. We think that's wrong. And to know that,
2 I don't think you have to look any further than the Attorney
3 General's letter that we have just been talking about. If we
4 could put the relevant point up on the screen, if you just
5 look -- and I think this is a touchscreen. Right? Does that
6 work? That's what I get for playing with the technology.

7 Anyway, it says right here that, "The undersigned
8 Attorney Generals respectfully request that the U.S. Congress
9 amend the CDA so that it restores the state and local
10 authorities their traditional jurisdiction to investigate and
11 prosecute those who promote prostitution and endanger our
12 children." I don't think it could be clearer that this is a
13 concession by the Attorney General in a letter he signed that
14 the CDA places limits on investigations. And we cited multiple
15 cases that say that. It shouldn't frankly be a controversial
16 point.

17 So then I think you then go to the question of is --
18 if the state breaches an immunity from an investigation, is
19 that enough to get you into federal court, and I think the
20 answer to that is clearly yes. We've cited four cases that say
21 that if you breach the immunities provided by the CDA, you have
22 a federal cause of action against the state, if they've
23 breached those immunities. That's the *VoiceNet* case and the
24 three *Backpage* cases. *Backpage*, by the way, is the very case
25 that's being talked about in this letter. And those cases are

1 plainly correct. The standard that governs whether a federal
2 statute creates the kind of right or immunity that can be
3 enforced under Section 1983, it's the *Firestone* case, and it
4 lays out a three-factor test. And basically you look at is the
5 federal statute designed to benefit the person who's claiming a
6 right and we satisfy that test. It's clear that the
7 Communications Decency Act, the immunity provisions we're
8 talking about are designed to benefit internet service
9 providers. So that's met.

10 The second is: Is it too vague or is it concrete?
11 And again, I think we've clearly met that that Section 230 is
12 very concrete. It says that no cause of action can be brought
13 and no liability imposed based on treating the Internet service
14 provider as the publisher of third-party information. It is
15 very concrete.

16 And the third step is: Is it mandatory or just
17 advisory? That's the third part of the *Firestone* test, and
18 it's clearly mandatory. It doesn't say states shouldn't do
19 this. It says they can't do it.

20 So it's clear that the CDA creates rights that are
21 enforceable under Section 1983. We have cited four cases that
22 hold that. And so that by itself would be enough to make clear
23 that there's jurisdiction here, but there's more. I don't
24 think anybody can dispute that the CDA ultimately provides an
25 immunity. And Section 1983 doesn't just create a cause of

1 action for federally protected rights. The statute says
2 rights, privileges, and immunity. So just on the plain
3 language of the statute itself it's clear that what we have
4 here, whether you want to call it a right under the CDA not to
5 be investigated or an immunity from investigation is sufficient
6 to get you into federal court. It's exactly what Section 1983
7 is talking about, a right, a privilege, or an immunity.

8 There was some suggestion by Mr. Miracle that somehow
9 to have a preemption claim in federal court you needed to be
10 asserting complete preemption. That's just an incorrect
11 reading of the cases. I think we've laid out in our brief, but
12 just to read you what the Supreme Court said in *Shaw*, "It is
13 beyond dispute that federal courts have a jurisdiction over
14 suits to enjoin state officials from interfering with federal
15 rights." That's the first provision I think I've explained
16 here now why we think that the CDA does create federal rights.

17 But then the next sentence, "A plaintiff who seeks
18 injunctive relief from state regulation on the ground that such
19 regulation is preempted by federal statute, which by virtue of
20 the supremacy clause of the constitution must prevail, thus
21 presents a federal question which the federal courts have
22 jurisdiction under 28SC Section 331 to resolve."

23 It just says preemption. It doesn't say anything
24 about complete preemption. There are 50 Supreme Court cases
25 with essentially the same language in them. None of them say

1 that you have to show complete preemption in order to bring an
2 affirmative cause of action against the state official to
3 enjoin them from doing something that is prohibited by federal
4 law. There's no case that says that.

5 The cases that they point to about complete preemption
6 are talking about a completely different situation. Those
7 cases are about disputes between two private parties, and the
8 question is can you get into federal court not when you're
9 seeking to enjoin a state official from violating the
10 constitution but just when you want to assert some kind of
11 federal defense under preemption. And those cases say, in the
12 private context, that, you know, the plaintiff is the author of
13 their complaint.

14 And so if the plaintiff says he's making a state law
15 claim, if there's complete preemption such that there's no
16 state law claim to make, you can get into federal court. But
17 if there isn't, then you can't. And that's the case law that
18 they are picking up on. But that case law is about private
19 disputes and about the plaintiff being the author of their own
20 complaint.

21 This case is about an effort to enjoin a state
22 official from violating the constitution because what he's
23 trying to do is preempted by federal law, and *Shaw* could not be
24 clearer. And as I said, *Shaw* cites in a string cite like 30
25 more cases immediately after it standing for that proposition

1 and calls it something that is beyond dispute. I mean, it is
2 frankly a little surprising that the state Attorney General has
3 chosen to stake their argument here by saying that something
4 the Supreme Court has said is beyond dispute, nonetheless
5 there's no jurisdiction.

6 So we think the court has clear jurisdiction here.
7 There was some suggestion that, well, you know, maybe every
8 single item in the subpoena has to be only focused on
9 third-party content before you even have jurisdiction to hear
10 this case. I don't think they have cited any case that
11 remotely supports that proposition. We have shown that the
12 subpoena beginning in its very first definition is explicitly
13 focused on immunized conduct, that that definition gets picked
14 up in the definition of aiding and abetting, which then gets
15 in -- excuse me, in definitions of dangerous conduct and
16 unlawful conduct, which then gets repeated in almost every
17 request in the subpoena. That by itself is enough to show
18 there's a very serious issue here about whether this subpoena
19 intrudes on the federally protected rights that Google has
20 under the Communications Decency Act, and that's enough to get
21 into federal court to be heard on our claim that they are
22 intruding into our federally protected rights.

23 There was a little bit of discussion about whether the
24 nonprosecution agreement that Google reached with the federal
25 government somehow changed the legal landscape here in some way

1 that matters. A couple of points about that. First, the
2 notion that someone can draw any inferences about Google's
3 present conduct based on that agreement I think doesn't hold
4 water. If you look at what that agreement says, most of the
5 facts it's talking about are things that happened ten years
6 ago. And if you read to the end of the agreement, what you see
7 is that it has an extensive discussion of what Google is doing
8 today in 2011 and how it cleaned up those problems.

9 So the notion that some inference about facts follows,
10 I think, doesn't make any sense. And there frankly really
11 isn't any legal inference you can draw from the nonprosecution
12 agreement about the scope of the Communications Decency Act
13 immunity for the simple reason that the nonprosecution
14 agreement related to issues of federal criminal law and I think
15 it's common ground that the Communications Decency Act
16 Section 230 doesn't provide immunity for issues of federal
17 criminal law. So the notion that we settled that case somehow
18 shows something about what we think the scope of CDA immunity
19 is as to a state prosecution that's been threatened doesn't
20 make any sense.

21 The last point that I wanted to make about that
22 nonprosecution agreement is that that concerned a topic,
23 importation of prescription drugs, that is exclusively the
24 province of the federal government. Of course, that makes
25 sense, importation protecting the borders, that's the federal

1 government's job. And the Food, Drug and Cosmetic Act, which
2 is the statute that's referenced in the Attorney General's
3 subpoena says right in it that these kind of cases related to
4 importation of prescription drugs must be brought in the name
5 of the United States. It's not something that's within the
6 proper scope of the Attorney General's jurisdiction. So I
7 don't think the MPA really affects the court's analysis at all
8 in this case.

9 You know, there was also a suggestion that Google
10 hasn't really been chilled because when it wrote letters to the
11 Attorney General trying to mollify him, it didn't say, *Oh, my*
12 *God, you've forced me at the point of a gun to do this.* It was
13 polite. But, you know, there's just no question that the
14 Attorney General's threats and its pressure led Google to make
15 changes. The Attorney General has bragged about that in his
16 press statements.

17 And, you know, the fact that Google sometimes does
18 things voluntarily has no impact on whether these particular
19 things that we've put in two affidavits about that say this was
20 done in response to the Attorney General's pressure, that fact
21 remains undisputed in the record, and that fact shows concrete
22 chilling. And, by the way, concrete chilling isn't even a
23 legal requirement. The standard for whether you've shown
24 sufficient First Amendment injury is whether or not the conduct
25 that's being complained of would chill a person of ordinary

1 firmness. And I don't know any person of any degree of
2 firmness that wouldn't be extraordinarily chilled by a state
3 Attorney General making the statement that I highlighted for
4 you this morning, including that people should go to jail, and
5 that the company should be convicted of a felony.

6 So I think we've more than met the standard even
7 without the specific facts that we've shown, but the specific
8 facts that we've shown make that even clearer that not only
9 would this chill a person of ordinary firmness, but it has, in
10 fact, chilled Google. And that's why we have -- the
11 significance of that to the jurisdictional points -- and you've
12 heard a lot from Mr. Miracle about why the CDA isn't enough to
13 get us in federal court. You didn't hear very much from him
14 about why the First Amendment isn't enough to get us in federal
15 court, and that's because it is. When a state Attorney General
16 threatens you for First Amendment protected conduct and says,
17 *You should go to jail for it*, that's a serious First Amendment
18 problem, and you get into federal court.

19 And, you know, just to -- Mr. Miracle was suggesting
20 that you can only get into federal court if you're actually
21 sort of making a facial challenge to the state statute. That
22 is incorrect. If you look at a case like *Steffel v. Thompson*
23 in the Supreme Court, that's a case in which the plaintiff goes
24 to federal court seeking declaratory relief because he wants to
25 picket at a shopping mall, and he's concerned that he's going

1 to get arrested if he does so. And he doesn't make -- under
2 Alabama's trespass law, he doesn't make a facial challenge to
3 Alabama's trespass law. He says, *If they arrest me that would*
4 *be a violation of my First Amendment rights as applied to me*
5 *and my particular conduct. I'm not saying you could never have*
6 *a trespass law. I'm saying to apply it to somebody who is*
7 *peacefully picketing at shopping mall as applied to that would*
8 *be unconstitutional.*

9 The Supreme Court doesn't say, *Oh, no, we can't hear*
10 *that case. Wait until they charge you. The Supreme Court*
11 *says, Absolutely that would be unconstitutional. You've got a*
12 *reasonable fear that's going to happen to you because they have*
13 *done it to other people. And we'll hear that case, and we'll*
14 *decide for you.*

15 And so to hear, we don't have to say that the
16 Mississippi Consumer Protection Act is unconstitutional in all
17 of its possible iterations, and we don't think that it is. But
18 if it's applied to Google's making available over the Internet
19 third-party content, then it is unconstitutional both under the
20 First Amendment and under the supremacy clause because of the
21 Communications Decency Act as applied not in the abstract.

22 And, you know, I don't think you heard any argument
23 from the Attorney General that addresses why it is that a court
24 doesn't have jurisdiction for such an as-applied challenge for
25 the First Amendment, because it does. I think the only thing

1 that they pointed to in their briefs was the case of *Laird v.*
2 *Tatum*, which I think as we've explained has nothing to do with
3 this. That would be analogous to this case if we were saying
4 the fact that the Attorney General has investigative power,
5 even though he has never directed it at us, is chilling our
6 speech. That's not what we're saying here. We've been very
7 clear about what the Attorney General has said to us, what he's
8 threatened us with and the subpoena that he's served. So we
9 have a firm and clear basis to bring our First Amendment
10 challenge here to his conduct, to the Consumer Protection Act
11 as it is being applied by the Mississippi Attorney General.

12 I'd like to, if I could, just pause for one minute.
13 If I could just circle back, there's some times when
14 Mr. Miracle was suggesting that we were asking for some broad
15 type of immunity, that we were trying to stop him from any
16 investigation. Our relief is quite specific, and if we could
17 just put it up on the screen.

18 This is what we asked for in our motion. We asked for
19 an injunction against enforcing the subpoena and from bringing
20 charges against Google for making accessible third-party
21 content to internet users as threatened. That's all we are
22 seeking, and that's exactly what we're entitled to under the
23 First Amendment and the Communications Decency Act. That is
24 essentially what's been in place for several months now as the
25 status quo was preserved by the court's prior order, and we

1 think it makes complete sense to continue that in place while
2 the court addresses the serious constitutional and statutory
3 claims that we've made.

4 THE COURT: All right. Thank you. I'll address my
5 first comment to the plaintiff. Have you looked at the amicus
6 briefs?

7 MR. NEIMAN: I have, sir.

8 THE COURT: And are you satisfied that your comments
9 would address any issues raised therein?

10 MR. NEIMAN: I believe so. I'm happy to address any
11 questions that Your Honor has, but I believe we've had an
12 opportunity to read them, obviously, prior to coming to court
13 today. And we've tried to make sure that we have addressed any
14 issue that might be out there.

15 THE COURT: All right. Thank you. And let me ask the
16 defense the same question. Have you had a chance to review
17 those briefs?

18 MR. MIRACLE: Yes, Your Honor.

19 THE COURT: And do you feel like your comments are
20 satisfactory with regard to the issues that might have been
21 raised in those briefs?

22 MR. MIRACLE: Yes, Your Honor.

23 THE COURT: All right. Thank you. I have not read
24 those briefs yet because I had not made a determination until
25 I -- well, I had not made the determination when they came in

1 as to whether they were something I should study, and I wanted
2 to hear the reaction of the parties before I read them. So now
3 that I am granting their -- granting them permission to file
4 those briefs, which have been filed, then I will read them.

5 So I will read these briefs -- those briefs, and then
6 I will contact the parties by the 19th and let you know if I
7 see any issues raised by those briefs that have not been
8 addressed thus far. I will do that by way of a filing, and I
9 will tell you what the question is, if I have a question. If I
10 do not have a question, then I will file with the clerk's
11 office a short order indicating that I have no questions and
12 I'm satisfied with the argument thus far. What I hope to do is
13 to be able whether the court has questions and then to set a
14 time period for the response to be able to provide the court's
15 decision by the 24th. Now, I would like the parties then
16 present for this decision by the court. Is the 4th all right
17 with the plaintiff?

18 MR. NEIMAN: May I have one moment?

19 THE COURT: Meanwhile the defense can check your
20 calendars too.

21 MR. NEIMAN: Your Honor, it's taking a minute for my
22 phone to pull up there.

23 THE COURT: Why don't you -- will your phone provide
24 you an answer in the next minute?

25 MR. NEIMAN: I'll let you know if there's any change

1 to that, but we'll be here.

2 THE COURT: Okay. Now, I'd like to do this at
3 1:30 p.m. Let me talk to the defense. Is that date and time
4 all right?

5 MR. MIRACLE: Yes, Your Honor.

6 THE COURT: All right. 1:30 p.m. I anticipate in
7 making a bench opinion. I very may well have the written
8 opinion and if so I will pass it out and discuss it with you.
9 So 1:30 p.m. on the 24th. I move from next week to this
10 particular date because Monday is a holiday and I start a trial
11 right after that. I will still be in trial when you come over
12 here, but I will break from that trial to address these
13 particular matters. So then, again, by the 19th if I see where
14 I need any further briefing on any of the issues raised in the
15 amicus, then I will let you know. If -- if I don't see any
16 need to change these dates, then we will stay connected to the
17 24th at 1:30.

18 MR. NEIMAN: Your Honor, I've had a chance to consult
19 my phone, and I am free on the 24th.

20 THE COURT: Telephone said you're all right?

21 MR. NEIMAN: Telephone gave me clearance, exactly.

22 THE COURT: All right.

23 MR. NEIMAN: I don't do anything without checking with
24 my phone first.

25 THE COURT: All right. So your telephone then

1 dictates to you.

2 MR. NEIMAN: Exactly.

3 MR. KRUTZ: I think it's his wife, Judge.

4 THE COURT: You're meddling, now. So then we will
5 have everybody here at 1:30 p.m. on the 24th. Is there
6 anything else I need to consider at this point? From the
7 plaintiff?

8 MR. NEIMAN: Not from us.

9 THE COURT: Defense?

10 MR. MIRACLE: No, sir.

11 THE COURT: Thank you all for coming. Then I'll see
12 you then.

13 (Hearing Concluded)

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CERTIFICATE OF REPORTER

I, CHERIE GALLASPY BOND, Official Court Reporter, United States District Court, Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true and correct transcript of the proceedings had in the aforementioned case at the time and place indicated, which proceedings were recorded by me to the best of my skill and ability.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

This the 12 day of March, 2015.

s/ *Cherie G. Bond*
Cherie G. Bond
Court Reporter